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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **LIVING ESSENTIALS' OPPOSITION TO HANSEN BEVERAGE COMPANY'S MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 10:30 a.m. Courtroom.: 1 Judge: Irma E. Gonzalez Date Filed: 07/01/08

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INTRODUCTION

Hansen Beverage Company ("Hansen") filed a Motion for Preliminary Injunction seeking to enjoin the defendant, Innovation Ventures, LLC ("Living Essentials"), from selling a product called 5-HOUR ENERGY®, the leading 2 oz. liquid, dietary supplement that has produced over $150,000,000 in revenue to Living Essentials over the last four (4) years. Hansen's motive is clear – shut down the market leader in 2 oz. "energy shots" to pave the way for Hansen's new 3 oz. "energy shot" which it expects to release this quarter.

Hansen's claims of irreparable harm are specious, at best. Hansen admits to monitoring the "energy shot" market and has likely known about the 5-HOUR ENERGY® product for months, if not years. Yet, Hansen waited until just prior to the release of its new "energy shot" to bring suit and seek a preliminary injunction. Such delay does not evidence irreparable harm. Nor does the $600 million in admitted "record sales" (a 20% increase over last year) that Hansen just reported for the first six (6) months of 2008. Clearly, Hansen has not been harmed, nor would it be harmed going forward if Living Essentials continues its business until a trial on the merits.

In contrast, the requested injunction would devastate Living Essentials' business and likely put it out of business and its employees out of work, giving Hansen the exact relief it requests without a trial on the merits. These facts do not support the drastic relief Hansen seeks.

Hansen's substantive claims are equally without merit. Hansen claims that the name 5-HOUR ENERGY®, the product label, and Living Essentials' advertising are false. In support of its motion, Hansen submitted an alleged "expert" opinion from an in-house physiologist employee, Dr. Thomas Davis, claiming that Living Essentials' advertising is false.

The facts, however, do not support Dr. Davis or Hansen. The following overwhelming evidence proves that Living Essentials' product name, label and advertising are neither misleading nor false:

- A clinical trial establishing that 5-HOUR ENERGY® provides energy for five (5) hours;
- Admissions from Hansen that ingredients in 5-HOUR ENERGY® provide "energy;"
- Testimony from Dr. Gail Mahady, the Director of Clinical Pharmacognosy at the University of Illinois, that the advertising claims are accurate; and
- Overwhelming scientific literature that supports Living Essentials' advertising claims.

In addition to this overwhelming scientific evidence, the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB), whose stated purpose is “to foster truth and accuracy in national advertising through voluntary self-regulation,” has previously reviewed and substantiated the accuracy of the very same advertising that Hansen claims is false.

Hansen cannot prove a probability of success on the merits or any irreparable harm, and the balance of hardship tips decidedly in Living Essentials' favor. Hansen's motion for preliminary injunction should be summarily denied, and the Court should consider sanctions for Hansen's transparent attempt to improperly use the Court’s injunctive powers for its business objectives.

ARGUMENT

I. LEGAL STANDARD FOR PRELIMINARY INJUNCTION

The party moving for a preliminary injunction must demonstrate that (1) it will suffer irreparable injury if the relief is denied; (2) it will probably prevail on the merits; (3) the balance of potential harms favors it; and (4) the public interest favors granting relief. *Int'l Jensen, Inc. v. Metrosound USA, Inc.*, 4 F.3d 819, 822 (9th Cir. 1993).

Courts also apply an "alternative standard" which requires the moving party to meet its burden by showing either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor. *Id.*

The alternative formulations are not separate tests, "but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases." *Id.* Under either standard, a preliminary injunction is an equitable remedy and "the trial court must balance the equities in the exercise of its discretion." *Id.*

Hansen carries the burden of persuasion on its motion and must make a “clear showing” that the “drastic remedy” of a preliminary injunction is deserved. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

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II. HANSEN CANNOT SUCCEED ON THE MERITS

A. Living Essentials' Name, Labels And Commercials Are Not False

Hansen asserts that that the name 5-HOUR *ENERGY*® and claims made by Living Essentials on its label and in its advertising are literally false. Hansen is wrong. As Hansen's own advertising, an independent clinical study on 5-HOUR *ENERGY*®, and the declaration of an independent expert all conclusively establish, Livings Essentials' product name and advertising are in no way false or misleading. In fact, the National Advertising Division of the Better Business Bureau determined – almost a year ago – in a widely published decision that the same Living Essentials advertising that Hansen claims is false in its motion, is instead true and accurate.

1. Hansen's Assertion That Only "Calories = Energy" Is False

Relying solely on its employee "expert," Dr. Thomas Davis, Hansen asserts that any claim that 5-HOUR *ENERGY*® provides energy, let alone five (5) hours of energy, is literally false because energy can only come from calories. (Hansen Brief at 13.) Hansen and Davis assert that since 5-HOUR *ENERGY*® has only 4 calories, it has little or no energy. (*Id.*) Dr. Davis' declaration is at best, misleading, and in many instances false.

First, Dr. Davis adopts a definition of "energy" from Wikipedia – "the ability to do work." (Davis Decl., ¶7.) Dr. Davis then alters his definition to equate "energy" with "calories. "[1] (Davis Decl., ¶8.) He ignores the fact that energy has numerous definitions (Mahady Decl. ¶4), including being defined as "vigor, liveliness and vitality." (Exhibit 1, Hamler Decl., Wordsmythe Dictionary.)[2] Indeed, if a term is subject to multiple meanings, this Court must consider all the meanings in determining if the term is misleading or false. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 274 (4th Cir. 2002)(stating that because packaging can "reasonably be understood" to convey two different, but plausible, messages, argument of literal falsity must fail); *BellSouth Advertising & Pub. Corp. v. Lambert Pub.*, 45 F.Supp.2d 1316, 1321 (S.D. Ala. 1999)(using a term

[1] Under Davis' definition, a cup of coffee, which contains only two calories, would not provide the consumer with any energy. Many early risers that start their day with a cup of coffee would likely not agree.

[2] The numerical exhibits referenced in this brief refer to the exhibits of the Declaration of Nathan R. Hamler, counsel for Living Essentials.

in “manner that reflects a different, though equally truthful and accurate, meaning” does not give rise to a Lanham Act violation).

Nevertheless, under either definition, or a broad definition that encompasses both, Living Essentials’ advertising is not misleading. It is the “vigor” caused by 5-HOUR *ENERGY*® that gives the consumer the “ability to do work.”

Moreover, it is the consumer’s perspective on the meaning of the term energy that is relevant, not Dr. Davis’ or the scientific textbooks. *Energy Four, Inc. v. Dornier Medical Systems, Inc.*, 765 F.Supp. 724, 729-30 (N.D. Ga. 1991)(common understanding of a term’s meaning among targeted consumers is the proper focus in a literal falsity analysis, even though incongruous with dictionary definition). Advertising throughout the “energy drink” market, ***including Hansen’s own advertising***, suggests that in the “energy drink” market, energy means “vigor, liveliness and vitality,” and that energy drinks need not contain massive amounts of calories to provide the consumer with energy. (Hamler Decl., Exhibits 2 and 4.)

Significantly, Hansen markets a number of “Low Carb” versions of its “energy drinks,” such as Diet Red Energy and Monster Low Carb that contain just a few more calories (10 calories per serving) than 5-HOUR *ENERGY*® (4 calories per serving). (Hamler Decl., Ex. 2.) Yet, Hansen refers to them as “energy drinks” that provide an “energy boost.” (*Id.*) Thus, Hansen itself believes that “energy” means something other than just “calories” to its own consumers, or it would not advertise as such.

Moreover, there are literally dozens of examples of other major Hansen competitors that, like Hansen and Living Essentials, market a low or no calorie “energy drink” that each claims provides energy to the consumer.[3] This is illustrated in Exhibit 4, a portion of which is summarized in the following table:

Energy Drink Product	**Carbs/Calories**	**Advertising Claim**
RockStar Zero Carb	0 Carb	“stepped up the energy” … “cut the calories and carbs”
Rock Star Sugar Free	0 Carb	“energy drink”

[3] It does not appear that Hansen has brought claims of “false advertising” against any of these manufacturers, some of which it identifies as its biggest competitors. (Hamler, Decl. Exhibit 3, Hansen 2008 10-K Report at 10.)

Energy Drink Product	Carbs/Calories	Advertising Claim
Red Bull Sugar Free	0 Carb/10 calories	"energy drink"
Boink	0 Carb/0 calories	"100% energy"
No Fear Sugar Free	1g Carb/10 calories	"super energy"
Dopamine Sugar Free	0 Carb/0 calories	"energy drink"
Sugar Free Crunk	0 Carb	"energy drink"
Sobe Adrenaline Rush	2g Carb/20 calories	"performance energy" … "energizing elements"
Sugar Free Burn	0 Carb	"energy to burn" "energy buzz with zero sugar"
Damzl Fuel Sugar Free	0 Carb/5 calories	"high octane energy drink"
Full Throttle Zero	0 Carb/10 calories	"energy drink"

Thus, it is clear that both the energy drink manufacturers, including Hansen, and the consumers both believe "energy" means something more than just "calories." Hansen did not provide one shred of evidence to suggest that Living Essentials' 5-HOUR *ENERGY*® fails to provide the consumer with five (5) hours of vigor, liveliness and vitality.

2. The Ingredients Of 5-HOUR *ENERGY*® Provide Energy

Dr. Davis' declaration is deficient in a second respect in that it ignores the ingredients in the bottle causing the body to generate energy. Indeed, other than discussing calories, Dr. Davis completely ignores the effects of the ingredients of 5-HOUR *ENERGY*®.

Dr. Gail Mahady, an independent expert, testifies that, based on a review of the scientific literature, the ingredients of 5-HOUR *ENERGY*® provide energy for the body. (Mahady Decl. ¶ 3.) Moreover, in direct contradiction to Dr. Davis' declaration, Hansen itself admits that the compounds found in 5-HOUR *ENERGY*® provide the consumer with an "energy boost." (Hamler Decl., Ex. 2.)

a. A Clinical Study And The Scientific Literature Supports Living Essentials

An independent clinical trial conducted by Dr. James Blum of the University of New England Medical Center (the "Blum clinical trial") conclusively establishes that Living Essentials' advertising is not literally false. (Henderson Decl., ¶ 21, Ex. C.) Likewise, Dr. Mahady testifies that both the Blum clinical trial and the scientific literature support the claims Living Essentials makes in its advertising. (Mahady Decl., ¶¶ 8-13.)

Dr. Mahady earned a Ph.D. in Pharmacognosy and is currently the Director of Clinical Pharmacognosy at the College of Pharmacy of the University of Illinois at Chicago. (Mahady Decl., ¶ 2.) Dr. Mahady has analyzed the Blum clinical trial and found it to be properly conducted and indisputable. (*Id.*, ¶ 13.)

Dr. Mahady strongly disagrees with the conclusory opinions of Dr. Davis. Indeed, she testifies that the Blum clinical trial establishes that the ingredients of the 5-HOUR *ENERGY*® product provide five (5) hours of energy to the user. (*Id.*, ¶ 12.)

Dr. Mahady also reviewed the ingredients of Living Essentials' 5-HOUR *ENERGY*® product and explained how each ingredient works to provide "energy" to the consumer. (*Id.*, ¶¶8-10.) More specifically, she concludes that the 5-HOUR *ENERGY*® ingredients caffeine, tyrosine, taurine, B-vitamins, folic acid and choline, all work to provide the body with energy. (*Id.*, ¶¶15-23.) In contrast to Dr. Davis' conclusory assertion that his opinions are supported by "the generally accepted principles of biochemistry, pharmacology and physiology" (Davis Decl. ¶¶16, 18-20, and 23), Dr. Mahady provides specific citation to the significant wealth of scientific literature that supports her opinions. (S*ee* footnotes to Mahady Decl.)

The Blum clinical trial, the opinions of an independent, experienced, and credentialed scientist, and the scientific literature all lead to one inescapable conclusion – Living Essentials' 5-HOUR *ENERGY*® product name, label and advertising are accurate. As such, Hansen has no possibility of success on the merits.

b. Hansen Admits 5-HOUR *ENERGY*'S® Ingredients Give Energy

As if all the scientific data were not enough, Hansen itself admits that some of the ingredients of 5-HOUR *ENERGY*®, which are also found in Hansen's "energy drinks," provide an "energy boost" to consumers. This admission alone condemns any probability of success by Hansen on the merits.

> In advertising for its ten (10) calorie Diet Red Energy drink, Hansen states:
>
> Everyone needs a 'jumpstart' from time to time. Now you can get yours **without all the calories!!** Hansen's Diet **Energy** Supplement is specially formulated with **the amino acid Taurine**, panax Ginseng, L-Carnitine, **key B Vitamins**, Glucose and other specially selected

> ingredients to provide an immediate **energy boost***. (Ex. 2, emphasis added.)

Likewise, Hansen's line of "Energy Water," named E_2O, contains a mere 10 calories, yet Hansen claims:

> E2O infuses the natural thirst quenching qualities of purified water with an **energy boost fueled by Ginseng, Taurine, B Vitamins, Electrolytes, Glucose and more!** (Ex. 5, emphasis added.)

Thus, Hansen admits that both B Vitamins and Taurine, two of the major components of 5-HOUR *ENERGY*®, provide an "energy boost." This admission alone destroys Dr. Davis' conclusions and renders Hansen's assertion that Living Essentials' product provides no energy due to its limited calories to be false.

3. Hansen's "Smoking Gun" Had No Ammunition

Hansen claims it has a "smoking gun" in the Blum clinical trial data and a statement published on Living Essentials' website, which Hansen asserts conclusively proves that Living Essentials' advertising is literally false. As the testimony of Dr. Mahady and the complete Blum study demonstrates, Hansen is wrong. It has no "smoking gun."

Hansen asserts that Living Essentials' product does not provide 5 hours of energy because only 57% of the clinical trial participants that consumed 5-HOUR *ENERGY*® experienced more than 5 hours of energy. As Dr. Mahady explains, the **complete** clinical trial demonstrates that 5-HOUR *ENERGY*® provided a statistical average of 4.92 hours of energy to those that consumed the product. (Mahady Decl., ¶ 13.) As Dr. Mahady indicates, Hansen provides no evidence to the contrary. (*Id.* at ¶3.) Thus, Hansen's claim that Living Essentials' product does not provide five (5) hours of energy is false. As such, Livings Essentials' product name and advertising are accurate and Hansen's injunction must be denied.

Likewise, Hansen asserts that the words "No crash" on the 5-HOUR *ENERGY*® label are false because a small portion of the clinical trial participants that consumed the product experienced a mild crash. Hansen, however, curiously omits the fact that the product contains a disclaimer on this statement which states "Individual results may vary. See www.fivehour.com for more information." Living Essentials' advertising is not literally false if 77% – the vast majority – do not experience a crash and consumers are informed that "individual results may vary."

Hansen additionally asserts that Living Essentials admits on its website that its product provides no "physical energy." That assertion is also false. Hansen takes the statement out of context. Living Essentials merely stated what it states here, what its independent expert states, and its clinical data supports – that 5-HOUR *ENERGY*® does not provide energy by putting massive amounts of calories (typically sugar) in the bottle like Hansen's product, but rather through stimulating the body to produce energy on its own.

The product name 5-HOUR *ENERGY*®, its label, and any Living Essentials' advertising asserting that it lasts for 5 hours are not literally false. To the contrary, they are 100% accurate.

4. The NAD Has Already Validated The Truth And Accuracy Of Living Essentials' Advertisements

The National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) has already substantiated the accuracy of the Living Essentials' advertising challenged in this motion. The purpose of the CBBB is "to foster truth and accuracy in national advertising through voluntary self-regulation." (Hamler Decl., Exhibit 14.) The NAD is the investigative arm of this organization used to police national advertisements to maintain consumer confidence in advertising claims. As noted on the CBBB website, us.bbb.org:

> The mission of the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is to review national advertising for truthfulness and accuracy and foster public confidence in the credibility of advertising. Policy and procedures for NAD are established by the National Advertising Review Council (NARC).
>
> (*Id.*)

The same advertising that is raised by Hansen in this motion, was reviewed by the NAD. Specifically, the NAD reviewed the following advertising statements made by Living Essentials:

- "Just one quick drink and you'll get hours of energy for work, play and everything in between."
- "Hours of energy now. No crash later—and no jitters."
- "B-Vitamins for energy."

- "Amino acids for focus and better mood."
- "Zero sugar, zero net carbs, zero herbal stimulants."
- "Drink it in seconds. Feel it in minutes. Last for hours."

(Henderson Decl., ¶ 19, Ex. A at p. 1.)

The NAD reviewed: (1) publicly available scientific evidence concerning the effect of each of the product ingredients on body physiology and function, (2) a double-blind, placebo controlled, randomized clinical trial on Living Essentials' 5-Hour Energy® products, and (3) a scientific report of a leading expert, explaining the well-known, and generally accepted mechanisms of action for the energy enhancing effects of the taurine, caffeine, and D-glucuronolactone combination contained in 5-Hour Energy®. (Henderson Decl., Ex. A.) Upon review of this information the NAD determined:

> NAD finds Living Essentials' energy performance claims substantiated. NAD seeks, however, to ensure that Living Essentials' advertising consistently discloses the presence of caffeine in 5-Hour Energy® and that Living Essentials' claim of no crash effect is qualified. Living Essentials intends to modify its advertising to accommodate NAD's concerns.
>
> (*Id.*)

Since the NAD guidelines were promulgated in 2007, Living Essentials advertising discloses that the 5-Hour Energy® product includes caffeine and qualified its "no crash" advertisement with "individual results may vary" and a reference to Living Essentials' website. Thus, the advertising industry's own organization – with accepted expertise in determining the truth and accuracy of advertisements – has already determined that Hansen's preliminary injunction motion has no merit.

B. Living Essentials' Claims Regarding Energy Drinks Are Not False

Hansen boldly asserts that "Living Essentials' television commercials draw negative comparison between 5-HOUR ENERGY® and another energy drink, which by clear and necessary implication is Hansen's "Monster Energy." (p. 19.) Living Essentials' television commercials mention "energy drinks" only in a general sense. The commercials do not mention Monster Energy or any other energy drink by name or implication. There are hundreds of energy drinks on the market, but Hansen claims that Monster Energy is identified because the Living Essentials' ad references sugar, caffeine and guarana – common ingredients in many energy drinks. One need only review the leading energy drink producers (who have not complained about Living Essentials' advertisements) to learn that they also include sugar, caffeine and guarana. (*See* Hamler Decl., Exhibit 6, ROCKSTAR, FULL THROTTLE and BAWLS ingredients list.) In its Complaint, Hansen alleged that it is the only energy drink that included guarana – an allegation that is clearly false.

Hansen then asserts that Living Essentials is untruthful when it states: "One minute you're wired up. The next you feel worse than before" and "the answer is large amounts of sugar and caffeine." These statements are fully supported by the scientific community and the clinical study discussed above. (Henderson Decl., Exs. A and C.) The clinical study compared the crash levels of 5-HOUR ENERGY®, Monster Energy, and Red Bull Energy.

> [T]he subjects testing Five-Hour had a more gentler let-down and did not go below their baseline, whereas the other drinks exhibit a crash that brought the energy of the subjects BELOW their morning energy levels.
>
> (*Id.*, Ex. C at p. 31.)

The NAD also reviewed the study and concluded that this "study provided support for the advertiser's claims that consumers will experience less of a 'crash' effect than they might with certain competing energy drinks that contain sugar." (*Id.*, Ex. B at 3.) As further explained:

> [I]t is the combination of sugar and caffeine in the competing energy drink products that causes the "crash" effect, and since 5-Hour Energy does not contain *any* sugar, it does not cause a "crash" effect. Living Essentials stated that the crash effect occurs because of changes in blood sugar levels. Competing energy drinks such as Red Bull and Monster, stated the advertiser, contain between 27 and 39 grams of sugar and 23 and 27 grams of sugar, respectively.
>
> (*Id.*, Ex. A at 11.)

The combination of caffeine and sugar, as explained in Living Essentials ads, leads to the "crash effect." Sugar and caffeine are major ingredients of energy drinks and have been discussed negatively in numerous publications illustrating that "ingestion of sugar and caffeine" leads to a "jolt and crash." (Ex. 7, The Daily Aztec, 3/21/2007, JUICED ENERGY DRINKS STILL GIVE JOLT, CRASH; The Associated Press, 10/30/2006, GLUT OF ENERGY DRINKS BRINGS FRESH WARNINGS.) Many organizations have considered banning "energy drinks" like Monster Energy from various locations, such as schools. (Ex. 8.)

Finally, Hansen also asserts that an Internet comparison ad must refer to Hansen's Monster Energy®. Even if it did, Hansen has not asserted that anything in the ad is false. Nor could it – the comparison simply lists the ingredients. (Ex. 10.)

As the NAD found, Living Essentials' television commercials are in no way false or misleading.

III. THE BALANCE OF HARMS TIPS SHARPLY AGAINST ENTRY OF A PRELIMINARY INJUNCTION

A. Irreparable Harm Is Not Presumed

In light of its inability to show that it would suffer any real harm if Living Essentials were allowed to remain in operation during the pendency of this lawsuit, Hansen falls back on the claim that irreparable harm is presumed, citing *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 944 (3rd Cir. 1993) and *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2nd Cir. 2007).

The Supreme Court recently ruled, however, that no such presumption applies. *eBay v. MercExchange, LLC*, 547 U.S. 388, 393-94, 126 S.Ct. 1837 (2007)(holding that presumptions in favor of injunctive relief are improper). Instead, courts must apply traditional principles of equity in determining whether to issue injunctive relief, which requires an **actual** showing of irreparable injury absent an injunction. *Id.* Following *eBay*, plaintiff must show, not presume, irreparable harm.

Hansen states that *eBay* is distinguishable because it involved a patent case. However Hansen offers no explanation why that fact distinguishes it. (Dkt # 16 at 7.) That is because there is none. Moreover, numerous courts have found that *eBay* applies equally to Lanham Act cases like this one. *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1137 (9th Cir. 2006)(Lanham Act case citing *eBay* as standard and not applying presumption although court found probability of success on merits); *Harris Research v. Lydon*, 505 F.Supp.2d 1161, 1168 (D. Utah 2007)(no presumption of irreparable harm in preliminary injunction motion on Lanham Act claim, in view of *eBay*); *MyGym LLC v. Engle*, 2006 WL 3524474 *11 (D. Utah 2007)(same.).

Castrol and *Time Warner* do not provide precedent for a presumption in this case as Hansen asserts. *Time Warner* states that the court can only apply a presumption of harm in cases "where [the] plaintiff demonstrates a likelihood of success in showing literally false [the] defendant's comparative advertisement which mentions the plaintiff's product by name." 497 F.3d at 161-162. That is not true because Hansen's name was never mentioned. Hansen then asserts that *Time Warner* stands for the proposition that you need not identify plaintiff by name in the advertisement. (Hansen Brief at 21.) *Time Warner* does not stand for such a broad proposition. In that case, applying *Castrol*, the court found that although the ads did not name the plaintiff, the ads in question could only be referring to plaintiff. 497 F.3d at 152.

In an attempt to bolster its weak case, Hansen combines elements from all the advertisements rather than considering each individually. When each is considered individually, as seen by consumers, Hansen's assertions crumble.

First, the 5-HOUR *ENERGY*® name and its label contain no comparative advertising, thus, no presumption of harm applies. Second, the television advertisements at issue do not refer to, or name Hansen, nor could one reasonably infer that they do. The ads refer non-specifically to "energy drinks." As discussed above, there are dozens of energy drinks with sugar, caffeine and guarana. These are not like the ads in *Time Warner* that could only have referred to the plaintiff. 497 F.3d at 152. Finally, Hansen asserts that an Internet ad comparing the ingredients of 5-HOUR *ENERGY*® to a "Popular Canned Energy Drink" must refer to Hansen's Monster Energy drink. Even if it did, Hansen has not asserted that anything in the comparison ad is false – the comparison is simply a list of the ingredients. (Ex. 10.) Notwithstanding the fact that Hansen cannot prove literal falsity for any of the ads, Hansen has not demonstrated any entitlement to a presumption of irreparable harm.

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B. Hansen's Conclusory Assertions Of Irreparable Harm Are Exposed As Absurd By "Record Sales" Over The Last Six Months

Simply put, Hansen has enjoyed "record sales" in a declining market, but asserts a conclusory and speculative belief of lost sales and a reduction in good will. (Hansen Brief at 21.) Hansen provides no evidence that any consumer was deceived by Living Essentials' allegedly deceptive advertising, and no evidence that it lost any sales to Living Essentials. Such speculative assertions of harm do not warrant a preliminary injunction. *Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 849-850 (9th Cir. 1985).

Moreover, any assertion of irreparable harm is destroyed by Hansen's recent earning reports where it reported nearly six hundred million dollars ($600,000,000) in sales for the first six months of 2008 **– a 20% increase** over the previous year. (Hamler Decl., Exhibit 11.) Hansen refers to these as “record sales.” (*Id*.) Hansen's CEO Sacks attributed this growth to its MONSTER® energy drinks, stating:

> We are proud of the continued strong performance of the MONSTER® brand at a time when almost all categories of ready-to-drink beverages in the United States are experiencing weakness.
>
> (Hamler Decl., Ex. 11, Hansen Press Release at 2.)

If Living Essentials is specifically targeting Hansen and causing this irreparable harm, why is Hansen experiencing “record sales”? The fact is, Hansen has not experienced any harm, which explains Sacks conclusory and speculative assertions of harm with no evidentiary basis, as well as its own financial information to the contrary. Hansen has not met its burden of establishing irreparable harm.[4]

C. Hansen's Delay Significantly Cuts Against Any Assertions Of Irreparable Harm

Hansen has likely known about Living Essentials' 5-HOUR *ENERGY*® product and its ingredients for years. Living Essentials' products are in tens of thousands of stores throughout the country – the same stores that sell Monster Energy. Yet, Hansen fails to explain why it waited,

[4] In any event, lost sales are not "irreparable harm" but are compensable by monetary damages.

until the verge of releasing its own 3-ounce “energy shot” product, to move for this preliminary injunction.

Inexcusable delay such as this is a well-established reason for determining that no irreparable harm exists and denying an injunction. *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)(finding that delay in requesting a preliminary injunction “implies a lack of urgency and irreparable harm”); *Exxon Corp. v. XOIL Energy Resources, Inc.*, 552 F.Supp. 1008, 1012 (S.D.N.Y. 1981)(**Two month delay** fatal to preliminary injunction motion); *W.E. Bassett Company v. Revlon, Inc.*, 354 F.2d 868, 872 n.4 (2d Cir. 1966)(**Two and one-half month delay** showed absence of irreparable injury); *Cordon Bleu v. BPC Pub. Ltd.*, 327 F.Supp. 267, 270-71 (S.D.N.Y. 1971)(No excuse for **13 week delay**); *Comic Strip, Inc. v. Fox Television Stations, Inc.*, 710 F.Supp. 976, 981(S.D.N.Y. 1989)(**Three month delay** showed no irreparable harm); *Mathematica Policy Research, Inc. v. Addison-Wesley Publishing Co.*, 1989 WL 63075 *2 (S.D.N.Y 1989)(**Three and one-half month delay** “dissipates their assertion of irreparable harm”). (Exhibit 12.) Moreover, a finding of delay in bringing a preliminary injunction rebuts any presumption of irreparable harm. *Whittier Colleges v. American Bar Ass'n*, 2007 WL 1624100, *9 (C.D. Cal. 2007) (Exhibit 13); *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F.Supp.2d 1070, 1090 (C.D. Cal. 1999)(same.)

Hansen has likely known about Living Essentials' 5-HOUR *ENERGY*® product for years. Indeed, Hansen is on the verge of introducing its own 3-ounce "energy shot," as Hansen calls it. (Hamler Decl., Ex. 15, Hansen Q-2 2008 Earnings Call Transcript at 4.) Hansen appears to have been monitoring the 2-ounce "energy shot" market for quite some time, waiting for it to grow before introducing its own product. (*Id.* at 11.) Hansen CEO Mr. Sacks recently stated:

> We think [energy shots] will remain a niche within the energy category. But it will be part of it and if it's part of it, you know we don't see any reason why we shouldn't be playing in that category and be a part for that reason we took the decision. **We sort of saw and wanted [energy shot category] to mature it to a sufficiently high level to justify the costs and focus of launching products and putting efforts and manpower behind it**.
>
> (*Id.* (emphasis added)).

If Hansen has been monitoring this market, there is no doubt that it has been aware of Living Essentials' popular, market-leading 5-HOUR *ENERGY*® product. Indeed, the Nielsen market surveys that Hansen quotes on page 2 of its brief demonstrate that Living Essentials' 5-HOUR *ENERGY*® product is one of the market leaders **and has been for years**.

Indeed, even the NAD section of the Better Business Bureau saw Living Essentials' nationwide advertisements in 2007. Yet, Hansen claims it did not monitor national advertising of a company it calls a "direct competitor" in a "highly competitive" industry. Not likely.

Hansen's CEO Mr. Sacks suggests that Hansen first learned of Living Essentials' advertisements about a month prior to the July 1, 2008 filing date of its Complaint,[5] however, Hansen's Lanham Act counsel has been communicating with Living Essentials regarding a counterfeiter of both Hansen and Living Essentials' products as early as March of 2008. (*See*, Hamler Decl., Exhibit 16, 3/17/2008 e-mail from Cianfrana to Gocha).) Hansen curiously omits when it first became aware of the complained of 5-HOUR ENERGY® product name and its label. Indeed, in both its Complaint and motion for preliminary injunction, Hansen asserts that claims of providing "energy" in the product name and label are literally false on their face given the product's ingredients and that it has only 4 calories. If that were truly the case, Hansen did not need Living Essentials' commercials or website to make its claims and seek injunctive relief.

Hansen has clearly known about Living Essentials' 5-HOUR *ENERGY*® product and its ingredients for many months, if not many years. Yet, Hansen cannot explain its delay in seeking relief. The motive of Hansen's motion is not to prevent irreparable harm because there is none. Rather, its motive is to remove a formidable competitor from the market to pave the way for its own competing product.

D. An Injunction Would Devastate Living Essentials' Business

A "critical element" in evaluating the propriety of injunctive relief is "the relative hardship of the parties." *City of Anaheim v. Kleppe*, 590 F.2d 285, 288 n. 4 (9th Cir. 1978). Equity requires that even if the plaintiff can show a likelihood of success on the merits (which it cannot here), preliminary injunctive relief should be denied if the balance of hardships tips decidedly in favor of the defendant. *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 705 F.Supp 491, 497(S.D. Cal. 1988)(injunctive relief denied even where plaintiff had shown that there was a likelihood of success on the merits because the balance of hardships tipped in favor of the defendants); *American Motorcyclist Assn. v. Watt*, 534 F.Supp. 923, 926 (C.D. Cal. 1981)(same.)

---

[5] Hansen likewise does not explain why it waited an **additional five (5) weeks** after filing the Complaint to file for injunctive relief if the harm was indeed irreparable.

Here, the balance of hardships tips sharply in favor of Living Essentials. Hansen's purported showing of irreparable harm rests almost entirely on an alleged presumption flowing from its supposed likelihood of success on the merits and some speculative assertions of harm. However, as discussed above, Hansen's inactivity for months and obvious lack of concern over that period undercuts its professed need for immediate relief now and proves the absence of impending harm justifying extraordinary judicial intervention. Moreover, Hansen’s $600 million “record sales” belittles Sacks' conclusory assertions.

In contrast to the speculative and avoidable harm alleged by Hansen, the requested injunction would cause enormous harm to Living Essentials. An injunction would effectively shut down Living Essentials, putting numerous employees out of work, and costing the company tens of millions of dollars. (Henderson Decl. ¶¶ 11-17.) The injunction would also effectively destroy any goodwill that Living Essentials has generated in its 5-HOUR *ENERGY*® product prior to any determination of liability on the merits. (*Id.* at 13.) The balance of harm here tips decidedly in favor of Living Essentials and strongly warrants against injunctive relief before a trial on the merits.

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CONCLUSION

For the reasons set forth above, Hansen's motion for a preliminary injunction should be summarily dismissed. In event the Court is considering granting Hansen's motion, Living Essentials requests an evidentiary hearing be scheduled on the motion. *See, e.g.*, *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988).[6]

Dated: August 29, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC

By *s/Nathan Hamler*
Nathan R. Hamler, Esq.

Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

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[6] While Living Essentials does not believe a preliminary injunction is appropriate, should the Court grant such an injunction, Living Essentials requests a hearing on the amount of an appropriate bond.

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

DEFENDANT'S OPPOSITION TO HANSEN BEVERAGE COMPANY'S MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

4416829v.1

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Attorneys for Defendant
INNOVATION VENTURES, LLC dba
LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 10:30 a.m. Courtroom.: 1, Fourth Floor Judge: Irma E. Gonzalez Date Filed: 07/01/08

I, NATHAN R. HAMLER, DECLARE AS FOLLOWS:

1. I am an attorney at law duly licensed to practice law in the State of California, and am an associate with the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C, counsel for

Defendant Innovation Ventures, LLC dba Living Essentials. I have personal knowledge of the facts set forth in this declaration and could and would competently testify as to the same.

2. Attached as Exhibit 1 to this declaration is a true and correct copy of a printout from the online dictionary Wordsmyth of the definition for the word “energy,” accessed 8/27/2008, located at the url address, http://www.wordsmyth.net/live/home.php?script=search&matchent=energy&matchtype=exact.

3. Attached as Exhibit 2 to this declaration is a true and correct copy of a document downloaded from plaintiff Hansen Beverage Company’s public web site in this action, accessed 8/28/2008, at the url address, http://www.hansens.com/products/products.php?subcat=15&color=energy, as well as a true and correct copy of a document downloaded from plaintiff Hansen’s Monster Energy public web site, accessed 8/28/2008, at the url address http://www.monsterenergy.com/product/locarb.php.

4. Attached as Exhibit 3 to this declaration is a true and correct copy of Hansen’s 2008 10-K Report.

5. Attached as Exhibit 4 to this declaration is a true and correct copy of advertisements from multiple energy drink companies that make claims of having little or no sugar, carbohydrates, or calories.

6. Attached as Exhibit 5 to this declaration is a true and correct copy of a document downloaded from plaintiff Hansen Beverage Company’s public web site in this action, accessed 8/20/2008, at the url address, http://www.hansens.com/products/prod_e20.php.

7. Attached as Exhibit 6 to this declaration is a true and correct copy of a document downloaded from Rock Star Energy Drink’s website, accessed 8/28/2008, at the url address, http://www.rockstar69.com/product.php?pdt=1, as well as a true and correct copy of a document downloaded from Full Throttle Energy Drink’s website, accessed 8/28/2008, at the url address, http://www.fullthrottleenergy.com/_dispatch_body.jsp., as well as a true and correct copy of a document downloaded from Bawls Guarana’s energy drink website, accessed 8/28/2008, at the url address, http://www.bawls.com/guarana.html.

8. Attached as Exhibit 7 to this declaration is a true and correct copy from the research website HighBeam Research of the newspaper article from The Daily Aztec, 3/21/2007, entitled JUICED ENERGY DRINKS STILL GIVE JOLT, CRASH, as well as a true and correct copy from the research website HighBeam Research of the newspaper article from the Associated Press, 10/30/2006, entitled GLUT OF ENERGY DRINKS BRINGS FRESH WARNINGS.

9. Attached as Exhibit 8 to this declaration is a true and correct copy of the online newspaper article from The Portland Press Herald and Maine Sunday Telegram, 2/19/2008, entitled ENERGY DRINKS: TIME TO KILL THE BUZZ?, as well as a true and correct copy of the online newspaper article from the GazetteXtra, 5/24/2008, entitled NO MORE AMPS: SCHOOLS MAY BAN 'ENERGY DRINKS'.

10. Attached as Exhibit 9 to this declaration is a true and correct copy of the United States District Court for the District of Utah's decision in *MyGym LLC v. Engle*, No. 1:06-CV-130 TC, 2006 WL 3524474 (December 6, 2006).

11. Attached as Exhibit 10 to this declaration is a true and correct copy of a document downloaded from defendant Living Essentials' public web site in this action for 5 HOUR ENERGY®, accessed 8/29/2008, at the url address, http://www.5hourenergy.com/compare.asp.

12. Attached as Exhibit 11 to this declaration is a true and correct copy of a press release downloaded from plaintiff Hansen Beverage Company's public web site, entitled "Hansen Natural Reports Record 2008 Second Quarter and Six Months Financial Results."

13. Attached as Exhibit 12 to this declaration is a true and correct copy of the United States District Court for the Southern District of New York's decision in *Mathematica Policy Research, Inc. v. Addison-Wesley Publishing Co.*, No. 89 CIV. 3431 (JFK), 1989 WL 63075 (June 5, 1989).

14. Attached as Exhibit 13 to this declaration is a true and correct copy of the United States District Court for the Central District of California's decision in *Whittier College v. American Bar Ass'n*, No. CV 07-1817 PA, 2007 WL 1624100 (May 7, 2007).

15. Attached as Exhibit 14 to this declaration is a true and correct copy of a document downloaded from web site for the Council of Better Business Bureaus, accessed 8/29/2008,

accessed 8/29/2008, at the url address, http://us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=11a9ff77-41ad-4861-a928-beface37d4f1.

16. Attached as Exhibit 15 to this declaration is a true and correct copy of a document downloaded on 8/20/2008 from the web site at the url address http://seekingalpha.com/article/89905-hansen-natural-corp-q2-2008-earnings-call-transcript.

17. Attached as Exhibit 16 to this declaration is a true and correct copy of an email from March 14 and 17, 2008 between Joe Cianfrani and Alan Gocha.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration is executed this 29th day of August, 2008 at San Diego, California.

s/Nathan Hamler
Nathan R. Hamler

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

DECLARATION OF NATHAN R. HAMLER IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

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EXHIBIT 1

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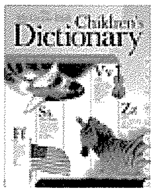

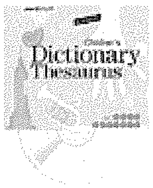

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energy

Browse the words alphabetically around "energy"
See entries that contain "energy"

Syllables:	en-er-gy
Part of Speech	noun
Pronunciation	**eh** nEr ji
Inflected Forms	energies
Definition	**1.** the power or capacity for activity.
Synonyms	might[2] (1) , power (1) , force (1)
Crossref. Syn.	power , activity
Similar Words	potentiality , dynamism , efficacy , effectiveness {effective} , strength , puissance , potency
Definition	**2.** a sufficient amount of such power.
Example	He has no energy to continue the job.
Synonyms	force (2) , steam (4) , vigor (1) , go[1] (3)
Similar Words	vitality , effort , drive , stamina[1] , moxie
Definition	**3.** vigor; liveliness; vitality.
Example	He spoke with energy on the subject of boat building.
Synonyms	vitality (1) , vigor (2) , zing , vim , verve , élan (1) , pep , zip[1] (2) , brio
Crossref. Syn.	bounce , blood , enthusiasm , action , sap , emphasis , activity , life
Similar Words	spirit , liveliness {lively (adj)} , vivacity , animation
Definition	**4.** that which is used up when any physical system does work.
Example	electrical energy.
Similar Words	power
Related Words	pain , dynamic , output , activity , main , force , initiative , might , fire , exuberance , ability , zeal

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EXHIBIT 2

Hansen's Natural

Products

Dazzling Crowds,
Quenching Thirsts

Hansen's Natural Soda...
fruit never had it so good.

Hansen's & Youth Sports

Energy Formula

It is no wonder they call it the "Human Race." It seems we are running everywhere these days. Unfortunately, given this frantic pace, we sometimes run out of steam.

Hansen's Energy was conceived and specially formulated to provide a boost whenever you need it the most.

Original Formula

Hansen's energy provides an immediate energy boost whenever you need it the most! Lightly carbonated citrus flavor.

Diet
Red
energy

Diet Red Energy

Everyone needs a 'jumpstart' from time to time. Now you can get yours without all the calories!! Hansen's Diet Energy Supplement is specially formulated with the amino acid Taurine panax Ginseng L-Carnitine key B Vitamins Glucose and other specially selected ingredients to provide an immediate energy boost*

Hansen's Diet Energy is lightly carbonated with a great tasting berry flavor. 1 *These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose treat cure or prevent any disease.

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NUT-UP • LOCA MOCA • ORIGINALE • MEAN BEAN • LO-BALL • IRISH BLEND • RUSSIAN • CHAI HAI

MONSTER ENERGY

The Monster Lab > sign up / sign in

TAURINE • GINSENG
LO-CARB
MONSTER
ENERGY

MONSTER ® ENERGY ®

Tear into a can of the meanest energy supplement on the planet. Lo-Carb MONSTER energy.

We went down to the lab and cooked up a double shot of our killer energy brew. We hacked out carbohydrates and calories, transplanted the wicked buzz and dialed in the flavor.

Lo-Carb MONSTER energy still delivers twice the BUZZ of a regular energy drink, but only has a fraction of the calories.

Ingredients:
Carbonated Water, Glucose, Citric Acid, Natural Flavor, Taurine, Sodium Citrate, Color Added, Panax Ginseng Root Extract, L-Carnitine, Maltodextrin, Potassium Sorbate, Sodium Acid Sulfate, Caffeine, Ascorbic Acid, Sodium Benzoate, Sucralose, Acesulfame Potassium, Sodium Chloride, Guarana Seed Extract, Inositol, Glucuronolactone, Niacinamide, Pyridoxine Hydrochloride, Riboflavin, Cyanocobalamin.

LO-CARB

ROLLOVER TO VIEW FACTS

Monster Shout Outs are emails from our customers telling us how much they love our product.
Hey send us some pictures and wicked stories to us in the lab and we might send you a Monster surprise.

EVEN US OLDER DUDES LIKE THIS STUFF. IT REALLY GIVES ME THE SHOCK I NEED TO KEEP PUMPING IRON IN TH - MICKEY COUNTS | 07.18.2008
EVEN US OLDER DUDES LIKE THIS STUFF. IT REALLY GIVES ME THE SHOCK I NEED TO KEEP PUMPING IRON IN THE GYM. MICKEY, 52

LO-CARB - JED MARVIN | 05.07.2008
I LOVE THE LO-CARB THE MOST. NOTHING CAN COMPARE IN TASTE. IT IS THE GREATEST. THANK YOU, MONSTER.

PARTY - ABBY CODERE | 04.17.2008
I LOOOVE LO-CARB! YOUR DRINK IS A PARTY IN MY MOUTH.

MONSTER ENERGY

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EXHIBIT 3

ITEM 1. BUSINESS

Overview

Hansen Natural Corporation was incorporated in Delaware on April 25, 1990. Our principal place of business is at 550 Monica Circle, Suite 201, Corona, California 92880 and our telephone number is (951) 739-6200. When this report uses the words "Hansen", "HBC", "the Company", "we", "us", and "our", these words refer to Hansen Natural Corporation and our subsidiaries other than Monster LDA Company ("MLDA"), unless the context otherwise requires.

We are a holding company and carry on no operating business except through our wholly owned subsidiaries, Hansen Beverage Company ("HBC") which was incorporated in Delaware on June 8, 1992, MLDA, formerly known as Hard e Beverage Company, and previously known as Hard Energy Company and as CVI Ventures, Inc., which was incorporated in Delaware on April 30, 1990 and Monster Energy UK Limited ("Monster UK"), a direct wholly owned subsidiary of HBC, which was incorporated in the United Kingdom on October 9, 2007. HBC generates all of our operating revenues.

We develop, market, sell and distribute "alternative" beverage category natural sodas, fruit juices and juice drinks, energy drinks and energy sports drinks, fruit juice smoothies and "functional drinks," non-carbonated ready-to-drink iced teas, children's multi-vitamin juice drinks, Junior Juice® juices and flavored sparkling beverages under the Hansen's® brand name. We also develop, market, sell and distribute energy drinks under the following brand names: Monster Energy®, Lost® Energy™, Joker Mad Energy™, Unbound Energy® and Ace™ brand names as well as Rumba™ brand energy juice. We also market, sell and distribute the Java Monster™ line of non-carbonated dairy based coffee drinks, natural sodas, premium natural sodas with supplements, organic natural sodas, seltzer waters, sports drinks and energy drinks under the Blue Sky® brand name. Our fruit juices for toddlers are marketed under the Junior Juice® brand name. We also market, sell and distribute vitamin and mineral drink mixes in powdered form under the Fizzit™ brand name.

We have two reportable segments, namely Direct Store Delivery ("DSD"), whose principal products comprise energy drinks, and Warehouse ("Warehouse"), whose principal products comprise juice based and soda beverages. The DSD segment develops, markets and sells products primarily through an exclusive distributor network whereas the Warehouse segment develops, markets and sells products primarily directly to retailers.

Corporate History

In the 1930's, Hubert Hansen and his three sons started a business to sell fresh non-pasteurized juices in Los Angeles, California. This business eventually became Hansen's Juices, Inc., which subsequently became known as The Fresh Juice Company of California, Inc. ("FJC"). FJC retained the right to market and sell fresh non-pasteurized juices under the Hansen trademark. In 1977, Tim Hansen, one of the grandsons of Hubert Hansen, perceived a demand for pasteurized natural juices and juice blends that are shelf stable and formed Hansen Foods, Inc. ("HFI"). HFI expanded its product line from juices to include Hansen's Natural Sodas®. California Co-Packers Corporation (d/b/a/ Hansen Beverage Company) ("CCC") acquired certain assets of HFI, including the right to market the Hansen's® brand name, in January 1990. On July 27, 1992, HBC acquired the Hansen's® brand natural soda and apple juice business from CCC. Under our ownership, the Hansen beverage business has significantly expanded and includes a wide range of beverages within the growing "alternative" beverage category, including in particular, energy drinks. In September 1999, we acquired all of FJC's rights to manufacture, sell and distribute fresh non-pasteurized juice products under the Hansen's® trademark together with certain additional rights. In 2000, HBC, through its wholly-owned subsidiary, Blue Sky Natural Beverage Co. ("Blue Sky"), which was incorporated in Delaware on September 8, 2000, acquired the natural soda business previously conducted by Blue Sky Natural Beverage Co., a New Mexico

corporation ("BSNBC"), under the Blue Sky® trademark. In 2001, HBC, through its wholly-owned subsidiary Hansen Junior Juice Company, ("Junior Juice"), which was incorporated in Delaware on May 7, 2001, acquired the Junior Juice business previously conducted by Pasco Juices, Inc. ("Pasco") under the Junior Juice® trademark.

Industry Overview

The alternative beverage category combines non-carbonated ready-to-drink iced teas, lemonades, juice cocktails, single serve juices and fruit beverages, ready-to-drink dairy and coffee drinks, energy drinks, sports drinks, and single-serve still water (flavored, unflavored and enhanced) with "new age" beverages, including sodas that are considered natural, sparkling juices and flavored sparkling beverages. The alternative beverage category is the fastest growing segment of the beverage marketplace according to Beverage Marketing Corporation. According to Beverage Marketing Corporation, wholesale sales in 2007 for the alternative beverage category of the market are estimated at $25.5 billion representing a growth rate of approximately 11.4% over the estimated wholesale sales in 2006 of approximately $22.9 billion.

Reportable Segments

We have two reportable segments, namely DSD, whose principal products comprise energy drinks and Warehouse, whose principal products comprise juice based and soda beverages. The DSD segment develops, markets and sells products primarily through an exclusive distributor network whereas the Warehouse segment develops, markets and sells products primarily direct to retailers. Corporate and unallocated amounts that do not relate to the DSD or Warehouse segments specifically have been allocated to "Corporate & Unallocated."

For financial information about our reporting segments and geographic areas, refer to Note 14 of Notes to the Consolidated Financial Statements set forth in Part II, Item 8. "Financial Statements and Supplementary Data" of this report, incorporated herein by reference. For certain risks with respect to our energy drinks see "Part I, Item 1A – "Risk Factors" below."

Products

Natural Sodas. Hansen's Natural Sodas® have been a leading natural soda brand in Southern California for the past 25 years. In 2007, according to Information Resources, Inc.'s Analyzer Reports for California, our natural sodas recorded the highest sales among comparable carbonated new age category beverages measured by unit volume in the California market. Our natural sodas are available in eleven regular flavors consisting of mandarin lime, key lime, grapefruit, raspberry, ginger ale, creamy root beer, vanilla cola, cherry vanilla creme, orange mango, kiwi strawberry and pomegranate. In early 2001, we introduced a new line of diet sodas using Splenda® sweetener as the primary sweetener. We initially introduced this line in four flavors: peach, black cherry, tangerine lime, and kiwi strawberry, and have since added four additional flavors: ginger ale, creamy root beer, grapefruit and pomegranate. Our natural sodas contain no preservatives, sodium, caffeine or artificial coloring and are made with high quality natural flavors and citric acid. We are currently in the process of converting the sweeteners used in our natural sodas from high fructose corn syrup to cane sugar. Our diet sodas are sweetened with Splenda® and Acesulfame-K. We package our natural sodas in 12-ounce aluminum cans. In 2002, we introduced a line of natural mixers in 8-ounce aluminum cans comprising club soda, tonic water and ginger ale .

In January 1999, we introduced a premium line of Signature Sodas in unique proprietary 14-ounce glass bottles. This line was marketed under the Hansen's® brand name, primarily through our distributor network, in six flavors. In early 2003, we repositioned this line into lower cost 12-ounce glass packaging to market our repositioned Signature Soda line at lower price points directly to our retail customers such as grocery chains, club stores, specialty retail chains and mass merchandisers and to the health food sector through specialty and health food distributors (collectively referred to as our "direct

retail customers"). Signature Soda was available in 12-ounce glass bottles in four flavors: orange crème, vanilla crème, ginger beer and sarsaparilla. We are in the process of discontinuing this product.

In September 2000, we acquired the Blue Sky® natural soda business from BSNBC. Our Blue Sky® product line comprises natural sodas, premium sodas, organic natural sodas, seltzer water, energy drinks, tea sodas and isotonic sports drinks. Blue Sky® natural sodas are available in twelve regular flavors consisting of lemon lime, grapefruit, cola, root beer, raspberry, cherry vanilla creme, Jamaican ginger ale, black cherry, orange creme, Dr. Becker, grape and cream soda. We also offer a premium line of Blue Sky® natural sodas which contain supplements such as ginseng. This line is available in four flavors consisting of ginseng cola, ginseng root beer, ginseng ginger ale and ginseng pomegranate. During 1999, Blue Sky® introduced a line of organic natural sodas, which are available in six flavors consisting of lemon lime, new century cola, orange divine, ginger ale, black cherry cherish, and root beer. We also market a seltzer water under the Blue Sky® label in three flavors: natural, lime and lemon. In 2002, we introduced a lightly carbonated Blue Sky® energy drink in an 8.3-ounce slim can. In 2006, we introduced a 16-ounce size of Blue Energy as well as both an 8.3-ounce and 16-ounce size of Blue Sky Juiced Energy, which is lightly carbonated and contains 50% juice. In 2004, we introduced a new line of Blue Sky® natural tea sodas in four flavors consisting of Imperial Lime Green Tea, Peach Mist Green Tea, Pomegranate White Tea and Raspberry Red Tea. We have since discontinued the Raspberry Red Tea flavor. The Blue Sky® products contain no preservatives, sodium or caffeine (other than the energy drink) or artificial coloring and are made with high quality natural flavors. Blue Sky® natural sodas, seltzer waters and tea sodas are all packaged in 12-ounce aluminum cans and are marketed primarily to direct retail customers. In March 2005, we introduced a new light line of Blue Sky® sodas using natural sweeteners in four flavors: cherry vanilla crème, creamy root beer, Jamaican ginger ale and wild raspberry in 12-ounce cans. We have since discontinued the wild raspberry flavor. In the third quarter of 2005, we introduced a new line of Blue Sky® natural sodas with real sugar in 12-ounce cans in four flavors: cherry vanilla crème, cola, ginger ale and root beer. In December 2005, we introduced a new line of Blue Sky® isotonic sports drinks in 16-ounce polyethylene terephthalate ("PET") plastic bottles in three flavors: orange, lemon lime, fruit punch and have subsequently added a fourth flavor, blue sky pomegranate. We are currently in the process of converting the sweeteners used in those Blue Sky® products that contain high fructose corn syrup to cane sugar.

In 2006, we introduced a new line of Hansen's green tea sodas under the Hansen® brand name in 16-ounce aluminum cans that contain no preservatives, sodium, caffeine or artificial colors, in four flavors; ginger, lemon mint, tangerine and pomegranate. We also introduced a diet version that contains no carbohydrates or sugar in three flavors: tangerine, lemon mint, ginger and in 2007, introduced an additional diet flavor, pomegranate.

In 2007, we introduced a new line of Hansen's natural flavored sparkling beverages under the Hansen® brand name in contemporary 10.5-ounce sleek cans in four flavors: blueberry pomegranate, cranberry grapefruit, valencia orange and dragonfruit. We also introduced a sparkling green tea line in contemporary 10.5-ounce sleek cans in two flavors: tangerine and pomegranate. These sparkling beverages are available in 90 calorie per can versions, sweetened with cane sugar; as well as in sugar free versions, sweetened with Splenda® and Acesulfame-K.

Hansen's® Energy Drinks. In 1997, we introduced a lightly carbonated citrus flavored Hansen's® energy drink in 8.3-ounce cans in 4 packs. Our energy drink competes in the "functional" beverage category, namely, beverages that provide a real or perceived benefit in addition to simply delivering refreshment. We also offered additional functional energy drinks as well as other functional drinks including a ginger flavored d-stress® drink, an orange flavored b-well™ drink, a guarana berry flavored stamina® drink, a grape flavored power drink, and a berry flavored "slim-down" drink that contained no calories, in the same size cans. We have since discontinued sales of such additional functional products. Our energy drinks contain vitamins, minerals, nutrients, herbs and supplements (collectively "supplements"). In 2004, we offered our Hansen's® energy drink in 16-ounce cans which has subsequently been discontinued. From 2006, we marketed our Hansen's brand energy drinks through the Warehouse segment and introduced Hansen's® Energy Pro™ 8.3-ounce cans in four packs. In 2001,

we introduced Energade®, a non-carbonated energy sports drink in 23.5-ounce cans. We are currently reevaluating the Energade® line. In 2001, we also introduced E_2O Energy Water®, a non-carbonated lightly flavored water, in 24-ounce blue PET plastic bottles which has subsequently been discontinued. At the end of 2002, we introduced a lightly carbonated diet energy drink in 8.3-ounce cans under the Hansen's Diet Red Energy® brand name. Our Diet Red Energy® energy drink is sweetened with Splenda® and Acesulfame-K.

Monster Energy ® Drinks. In 2002, we launched a new carbonated energy drink under the Monster Energy® brand name, in 16-ounce cans, which was almost double the size of our regular energy drinks in 8.3-ounce cans and of the vast majority of competitive energy drinks on the market at that time. Our Monster Energy® drink contains different types and levels of supplements than our Hansen's® energy drinks and is marketed through our full service distributor network. In 2003, we introduced a low carbohydrate ("Lo-Carb") version of our Monster Energy® energy drink. In 2004, we introduced 4-packs of our Monster Energy® energy drinks including our Lo-Carb version and, towards the end of 2004, we launched a new Monster Energy® Assault™ energy drink in 16-ounce cans. During the first half of 2005, we introduced our Monster Energy® drinks and Lo-Carb Monster Energy® in 24-ounce size cans as well as Monster Energy®, Lo-Carb Monster Energy® and Monster Energy® Assault™ in 8.3-ounce size cans. In September 2005, we introduced a new Monster Energy® Khaos™ energy drink in 16-ounce cans. Monster Energy® Khaos™ is lightly carbonated and contains 50% juice. In 2006, we introduced our Monster Energy® Assault™ and Monster Energy® Khaos™ energy drinks in 24-ounce size cans. Also in 2006, we introduced Monster Energy® Khaos™ energy drinks in 8.3-ounce size cans. During the first quarter 2007, we introduced Monster Energy® energy drinks in 8-packs and in September 2007, we introduced Monster Energy® energy drinks in 32-ounce cans. In March 2007 we introduced a new Monster M-80™ energy drink in 16-ounce size cans and added 8.3-ounce and 24-ounce sized cans of this drink in October 2007. Monster M-80™ energy drinks are lightly carbonated and contain 80% juice. In November 2007, we introduced a new Monster Heavy Metal™ energy drink in 32-ounce size cans. In December 2007, we introduced a new Monster MIXXD™ energy drink in 8.3-ounce, 16-ounce and 24-ounce size cans. Monster MIXXD™ energy drinks are lightly carbonated and contain 30% juice.

Lost ® Energy™ Drinks. In 2004, we launched a new carbonated energy drink under the Lost® brand name, in 16-ounce cans and have subsequently added an 8.3-ounce version. Towards the end of 2005, we introduced a lo-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink, all in 16-ounce cans. Lost® Five-O™ contains 50% juice and is lightly carbonated. In December 2005, we introduced Lost® and Lost® Five-O™ in 24-ounce size cans. In November 2007, we introduced a new Lost® Cadillac™ energy drink in 16-ounce cans. The Lost® brand name is owned by Lost International LLC and the drinks are produced, sold and distributed by us under exclusive license from Lost International LLC.

Rumba™ Energy Juice. In December 2004, we launched a new non-carbonated energy juice under the Rumba™ brand name in 15.5-ounce cans. Rumba™ energy juice is a 100% juice product that targets male and female morning beverage consumers and is positioned as a substitute for coffee, caffeinated sodas and 100% orange or other juices.

Joker Mad Energy ™ Drinks. In the first quarter of 2005, we introduced Joker Mad Energy™ energy drinks in 16-ounce cans. Joker Mad Energy™ energy drinks come in regular, lo-carb and juice versions in 16-ounce cans.

Ace™ Energy Drinks. In August 2006, we introduced Ace™ energy drinks in 16-ounce cans. Ace™ energy drinks come in regular, lo-carb and juice versions in 16-ounce cans.

Unbound Energy® Drinks. In October 2006, we acquired the Unbound Energy® trademark and assumed the production, marketing and sale of Unbound Energy ® energy drinks in 16-ounce cans. We subsequently introduced lo-carb and juice versions in 16-ounce cans.

Java Monster™ Coffee Drinks . In May 2007, we launched a new line of non-carbonated dairy based coffee drinks under the Java Monster™ brand name in 15-ounce cans. We initially introduced this line in three flavors: Big Black™ (since renamed Originale), Loca Moca™ and Mean Bean™, and have since added five additional flavors: Russian™, Irish Blend™, Chai Hai™, Nut Up™ and Lo-Ball™.

Juice Products and Smoothies . Our fruit juice product line includes Hansen's® Natural Apple Juice, which is packaged in 64-ounce PET plastic bottles and 128-ounce polypropylene bottles and White Grape, White Grape Peach, Purple Grape, Orange, Pomegranate, Apple Strawberry and Apple Grape juice blends, in 64-ounce PET plastic bottles. These Hansen's® juice products contain 100% juice (except Pomegranate which contains 27% juice) as well as Vitamin C. Hansen's® juice products compete in the shelf-stable juice category. We also offer juice cocktails (cranberry raspberry, apple white grape, apple berry and apple) in 32-ounce PET plastic bottles.

In March 1995, we introduced a line of fruit juice smoothie drinks in 11.5-ounce aluminum cans. Certain flavors were subsequently offered in glass and PET plastic bottles. We have since discontinued offering smoothies in glass and PET plastic bottle packages. Hansen's fruit juice smoothies have a smooth texture that is thick but lighter than a nectar. In 2006, we reformulated Hansen's smoothies by adding more fruit purees. Hansen's smoothies in 11.5-ounce aluminum cans now contain approximately 25% juice. Our fruit juice smoothies provide 100% of the recommended daily intake for adults of Vitamins A, C & E and represented Hansen's entry into what is commonly referred to as the "functional" beverage category. Hansen's® fruit juice smoothies are available in seven flavors: strawberry banana, peach berry, mango pineapple, guava strawberry, pineapple coconut, whipped orange and Island Energy Blast. We have discontinued our lo-carb smoothie line.

We market the above juice and smoothie products to our direct retail customers.

Iced Teas. In 2006, we introduced a new line of iced teas in sleek 16-ounce wide mouth PET plastic bottles. This line is sweetened with cane sugar and includes green tea, peach green tea, lychee black tea and pomegranate green tea. In addition, we offer sugar free peach green tea, pomegranate green tea and acai black tea which are all sweetened with sucralose as well as an unsweetened black tea.

Juices for Children. In 1999, we introduced two new lines of children's multi-vitamin juice drinks in 8.45-ounce aseptic boxes, which were subsequently transitioned to 6.75-ounce versions. Each drink contains eleven essential vitamins and six essential minerals. We introduce new flavors in place of existing flavors from time to time. One of these two lines is a dual-branded 100% juice line named Juice Blast® which was launched in conjunction with Costco Wholesale Corporation ("Costco") and is sold through Costco stores. The other line was a 10% juice line named "Hansen's Natural Multi-Vitamin Juice Slam®", which was available to all of our customers. During 2000, we repositioned that latter line as a 100% juice line under the Juice Slam® name, which we market to grocery store chain customers, the health food trade, and other customers. Both the Juice Blast® and Juice Slam® lines are marketed in 6.75-ounce aseptic boxes. The Juice Slam® line has four flavors and the Juice Blast® line has three flavors.

In 2003, we further extended our fruit juice product line by introducing a 100% apple juice in 6.75-ounce aseptic pouches under the Apple Blasters™ brand. In 2006 we discontinued our Apple Blasters™ product and repositioned our pouch line by introducing two Juice Slam® organic pouches in organic apple and organic fruit punch flavors with 100% juice.

In May 2001, we acquired the Junior Juice® beverage business. The Junior Juice® product line is comprised of seven flavors of 100% juice in 4.23-ounce aseptic packages and is targeted at toddlers. Six flavors of the Junior Juice® line have calcium added and all flavors have vitamin C added. The current flavors in the Junior Juice® line are apple, apple berry, orange twist, apple grape, mixed fruit, fruit punch and white grape.

In 2006, we extended the Junior Juice® line by adding organic apple and organic berry medley juice products in 4.23-ounce aseptic boxes. Each of our organic Junior Juice® products have 100% juice and contain 100% of the daily recommended allowance of vitamin C and 10% of the daily recommended allowance of calcium.

Bottled Water. Our still water products were introduced in 1993 and are primarily sold in 0.5-liter plastic bottles to the food service trade. Sales of this product line are very limited.

Fizzit™ Powdered Drink Mixes. In December 2005, we introduced a new line of vitamin and mineral drink mixes in powdered form under the Fizzit™ brand name in both functional and vitamin and mineral formulas. The functional formulas are offered in raspberry (joint formula), orange (immune support formula), strawberry (immune support formula) and cranberry (women's health formula). The vitamin and mineral formula is offered in lemon lime and strawberry flavors.

During 2007, we continued to expand our existing product lines and further develop our markets. In particular, we continued to focus on developing and marketing beverages that fall within the category generally described as the "alternative" beverage category, with particular emphasis on energy type drinks.

Other Products

We continue to evaluate and, where considered appropriate, introduce additional flavors and other types of beverages to complement our existing product lines. We will also evaluate, and may, where considered appropriate, introduce functional foods/snack foods that utilize similar channels of distribution and/or are complementary to our existing products and/or to which our brand names are able to add value.

We also develop and supply, on a limited basis, selected beverages in different formats to a limited number of customers with the objective of solidifying our relationship with those customers.

Manufacture and Distribution

We do not directly manufacture our products but instead outsource the manufacturing process to third party bottlers and contract packers.

We purchase concentrates, juices, flavors, supplements, cans, bottles, aseptic boxes, aseptic pouches, caps, labels, trays, boxes and other ingredients for our beverage products which are delivered to our various third party bottlers and co-packers. Depending on the product, the third party bottlers or packers add filtered water and/or sucrose, or cane sugar, or high fructose corn syrup or Splenda® brand sweetener, Acesulfame-K and/or citric acid or other ingredients and supplements for the manufacture and packaging of the finished products into Hansen approved containers in accordance with our formulas. In the case of sodas and other carbonated beverages, the bottler/packer adds carbonation to the products as part of the production process.

We are generally responsible for arranging for the purchase of and delivery to our third party bottlers and co-packers of the containers in which our beverage products are packaged.

All of our beverage products are manufactured by various third party bottlers and co-packers situated throughout the United States under separate arrangements with each of such parties. The majority of our co-packaging arrangements are on a month-to-month basis. However, certain of our co-packing arrangements are described below:

(a) Our agreement with Gluek Brewing Company ("Gluek") pursuant to which Gluek packages certain of our energy drinks. This contract continues until May 2008 and is automatically renewed for

one year periods thereafter. Either party is entitled at any time to terminate the agreement upon 180 days prior written notice to the other party.

(b) Our agreement with Seven-Up/RC Bottling Company of Southern California, Inc. ("Seven-Up") pursuant to which Seven-Up packages certain of our energy drinks. This contract continues until March 31, 2008. Upon termination prior to such time we are entitled to recover certain equipment we have purchased and installed at Seven-Up's facility.

(c) Our agreement with Nor-Cal Beverage Co., Inc. ("Nor-Cal") pursuant to which Nor-Cal packages certain of our Hansen's® juices in PET plastic bottles. This contract continues until August 2008 and is automatically renewed for one year periods thereafter unless terminated by HBC not less than 90 days before the end of the then current term.

(d) Our agreement with Dr. Pepper Bottling Co. ("Dr. Pepper") pursuant to which Dr. Pepper packages certain of our energy drinks. This contract continues until December 31, 2009 and is automatically renewed for one year periods thereafter, unless terminated by either party with not less than 30 days notice.

(e) Our agreement with Lucerne Foods, Inc. ("Safeway-Norwalk") pursuant to which Safeway-Norwalk packages certain of our energy drinks and Hansen's Natural Sodas®. This contract continues until March 31, 2009 and is renewable annually thereafter unless terminated by either party on not less than 6 months notice.

(f) Our agreement with Pri-Pak, Inc. ("Pri-Pak") pursuant to which Pri-Pak packages certain of our energy drinks. This contract continues indefinitely but may be terminated at any time by either party upon ninety (90) days prior written notice to the other.

(g) Our agreement with Carolina Beer & Beverage pursuant to which Carolina Beer & Beverage packages certain of our energy drinks. This contract continues until April 10, 2009 and is automatically renewable for one year periods thereafter, unless terminated by either party on not less than 180 days notice.

(h) Our agreement with Southeast Atlantic Beverage Corporation ("Southeast") pursuant to which Southeast packages certain of our energy drinks. This contract continues until July 23, 2008 and is automatically renewable for one year periods thereafter, unless terminated by either party not less than 180 days prior to the end of the then current term.

(i) Our agreement with Dairy Farmers of America, Inc. ("DFA") pursuant to which DFA packages certain of our energy drinks. This contract continues until March 1, 2010 and is automatically renewable annually thereafter, unless either party provides notice of cancellation at least 90 calendar days prior to the end of the initial term.

(j) Our agreement with Portland Bottling Company ("Portland Bottling") pursuant to which Portland Bottling packages certain of our energy drinks. This contract continues until March 31, 2008 and is automatically renewable for one year periods. Either party is entitled, at any time, to terminate the agreement upon 90 days prior written notice to the other party.

(k) Our agreement with O-AT-KA Milk Products Cooperative ("O-AT-KA") pursuant to which O-AT-KA packages certain of our energy drinks. This contract continues until September 30, 2010 and is automatically renewable annually thereafter, unless either party provides notice of cancellation at least 90 days prior to the end of the initial term.

(l) Our agreement with Giumarra & Associates Beverage Company ("Giumarra") pursuant to which Giumarra packages certain of our energy drinks and in due course, juices. This contract continues until June 28, 2009 and is automatically renewable annually thereafter, unless either party provides notice of cancellation at least 180 days prior to the end of the current term.

In certain instances, equipment is purchased by us and installed at the facilities of our co-packers to enable them to produce certain of our products. In general, such equipment remains our property and is to be returned to us upon termination of the packing arrangements with such co-packers or is amortized over a pre-determined number of cases that are to be produced at the facilities concerned.

We pack certain products outside of the West Coast region to enable us to produce products closer to the markets where they are sold and thereby reduce freight costs. As volumes in markets outside of California grow, we continue to secure additional packing arrangements closer to such markets to further reduce freight costs.

Our ability to estimate demand for our products is imprecise, particularly with new products, and may be less precise during periods of rapid growth, particularly in new markets. If we materially underestimate demand for our products or are unable to secure sufficient ingredients or raw materials including, but not limited to, glass, PET/plastic bottles, aseptic boxes, cans, labels, flavors or supplement ingredients or certain sweeteners, or packing arrangements, we might not be able to satisfy demand on a short-term basis.

Although our production arrangements are generally of short duration or are terminable upon request, we believe a short disruption or delay would not significantly affect our revenues since alternative packing facilities in the United States with adequate capacity can usually be obtained for many of our products at commercially reasonable rates and/or within a reasonably short time period. However, there are limited packing facilities in the United States with adequate capacity and/or suitable equipment for many of our products, including Hansen's® brand energy drinks in 8.3-ounce cans, aseptic juice products, teas in 16-ounce PET/plastic bottles, Monster Energy®, Lost® Energy ™ , Rumba ™ , Joker Mad Energy ™ , Ace™, Unbound Energy® energy drinks in 8.3-ounce, 16-ounce, 24-ounce and 32-ounce cans and the Java Monster™ line of non-carbonated dairy based coffee drinks in 15-ounce cans. A disruption or delay in production of any of such products could significantly affect our revenues from such products as alternative co-packing facilities in the United States with adequate capacity may not be available for such products either at commercially reasonable rates and/or within a reasonably short time period, if at all. Consequently, a disruption in production of such products could affect our revenues. We continue to seek alternative and/or additional co-packing facilities in the United States or Canada with adequate capacity for the production of our various products to minimize the risk of any disruption in production.

On April 28, 2006, HBC entered into a distribution agreement with Cadbury Bebidas, S.A. de C.V. ("Cadbury Bebidas"), for exclusive distribution by Cadbury Bebidas throughout Mexico, excluding Baja California, of our Monster Energy® and Lost® Energy ™ energy products.

On May 8, 2006, HBC entered into the Monster Beverages Off-Premise Distribution Coordination Agreement and the Allied Products Distribution Coordination Agreement (jointly, the "Off-Premise Agreements") with Anheuser-Busch, Inc., a Missouri corporation ("AB"). Under the Off-Premise Agreements, select Anheuser-Busch distributors (the "AB Distributors") distribute and sell, in markets designated by HBC, HBC's Monster Energy® and Lost® Energy ™ brands non-alcoholic energy drinks, Rumba™ brand energy juice and Unbound Energy® brand energy drinks, as well as additional products that may be agreed between the parties. We intend to continue building our national distributor network primarily with select AB distributors as well as with our sales force throughout 2008 to support and grow the sales of our products.

Pursuant to the Anheuser-Busch Distribution Agreements (the "AB Distribution Agreements") entered into with newly appointed AB Distributors, non-refundable amounts received totaling $21.0 million and $20.9 million were recorded by us related to such appointed AB Distributors for the costs of terminating our prior distributors for the years ended December 31, 2007 and 2006, respectively. Such

amounts have been accounted for as deferred revenue in the accompanying consolidated balance sheets as of December 31, 2007 and 2006, respectively, and are recognized as revenue ratably over the anticipated 20 year life of the respective AB Distribution Agreements. Revenue recognized was $1.9 million and $0.4 million for the years ended December 31, 2007 and 2006, respectively. Related distributor receivables of $5.4 million and $4.5 million are included in accounts receivable net, in the accompanying consolidated balance sheets as of December 31, 2007 and 2006, respectively.

As of December 31, 2007 and 2006, amounts totaling $0.1 million and $3.3 million, respectively, were received by us from certain other AB Distributors in anticipation of executing AB Distribution Agreements with us. Such receipts have been accounted for as customer deposit liabilities in the accompanying consolidated balance sheets as of December 31, 2007 and 2006.

We incurred termination costs amounting to $15.3 million and $12.7 million in aggregate for the years ended December 31, 2007 and 2006, respectively, to certain of our prior distributors. Such termination costs have been expensed in full and are included in operating expenses for the years ended December 31, 2007 and 2006. Accrued distributor terminations in the accompanying consolidated balance sheets as of December 31, 2007 and 2006 were $4.3 million and $7.0 million, respectively.

On February 8, 2007, HBC entered into the On-Premise Distribution Coordination Agreement (the "On-Premise Agreement") with AB. Under the On-Premise Agreement, AB will manage and coordinate the sales, distribution and merchandising of Monster Energy® energy drinks to on-premise retailers including bars, nightclubs and restaurants in territories approved by HBC.

On March 1, 2007, HBC entered into a distribution agreement with Pepsi-QTG Canada, a division of PepsiCo Canada, ULC ("Pepsi Canada"), for the exclusive distribution by Pepsi Canada throughout Canada of our Monster Energy®, Lost® Energy ™ and Hansen's® energy products.

Distribution levels vary from state to state and from product to product. Certain of our products are sold in Canada and Mexico. We also sell a limited range of our products to distributors outside of the United States, including in the Caribbean, Central and South America, Japan, Korea, Saudi Arabia, Hong Kong, South Africa and the United Kingdom.

We continually seek to expand distribution of our products by entering into agreements with regional bottlers or other direct store delivery distributors having established sales, marketing and distribution organizations. Many of our bottlers and distributors are affiliated with and manufacture and/or distribute other soda and non-carbonated brands and other beverage products. In many cases, such products compete directly with our products.

We continue to endeavor to reduce our inventory levels.

During 2007, we continued to expand distribution of our natural sodas outside of California. We expanded our national sales force to support and grow sales, primarily of Monster Energy® drinks, Lost® Energy ™, Joker Mad Energy ™, Unbound Energy®, Ace ™ energy drinks, and Rumba ™ energy juice and we intend to continue to build such sales force in 2008.

Our Blue Sky® products are sold primarily to the health food trade, natural food chains and mainstream grocery store chains, through specialty health food distributors.

During 2004, we entered into exclusive contracts with the State of California Department of Health Services, Women, Infant and Children ("WIC") Supplemental Nutrition Branch ("DHS"), (the "WIC Contracts") to supply 100% apple juice and 100% blended juice in 64-ounce PET plastic bottles. The WIC Contracts commenced on July 12, 2004 and were due to expire in July 2007. The parties mutually agreed to extend the WIC Contracts until July 11, 2008. WIC-approved items are stocked by the grocery trade and by WIC-only stores. Products are purchased by WIC consumers with vouchers

given by the DHS to qualified participants. Due to significant cost increases mainly for apple juice concentrate and PET plastic bottles, we are currently negotiating a mutually acceptable early termination of the WIC Contracts with the State of California. We have been informed that future WIC contracts will not be granted on an exclusive basis and that certain manufacturers (including HBC) will be eligible to sell certain qualifying products to WIC participants. The Company is informed and believes that the WIC program intends reducing the total quantity of fruit juice products that will be available to WIC participants. We anticipate that as a consequence of the above, our revenue from these products is likely to be lower in the future. However, we do not believe that such reduction in revenue will have a material impact on our future operations.

In September 2007, we relocated our corporate offices to newly leased offices in Corona, California. In October 2006, we also entered into a lease agreement pursuant to which we leased 346,495 square feet of warehouse and distribution space located in Corona, California. This lease commitment provides for minimum rental payments for 120 months commencing March 2007, excluding renewal options. The monthly rental payments are $167,586 at the commencement of the lease and increase over the lease term by 7.5% at the end of each 30 month period. The new warehouse and distribution space replaced our previous warehouse and distribution space located in Corona, California.

In October 2006, we entered into an agreement to acquire 1.8 acres of vacant land for a purchase price of $1.4 million. The property is located adjacent to the new leased warehouse and distribution space. We are reviewing the feasibility of constructing a new office building on such land, which will replace our existing office space.

We have sublet in excess of 50% of our previous office, warehouse and distribution space for the remainder of that lease term, which expires in October 2010. (See "Part I, Item 2 – Properties").

Raw Materials and Suppliers

The principal raw materials used by us are aluminum cans, glass bottles and PET plastic bottles as well as juices, sucrose, cane sugar, sucralose, milk and cream, the costs of which are subject to fluctuations. Due to the consolidations that have taken place in the glass industry over the past few years, the prices of glass bottles continue to increase. The prices of PET plastic bottles and certain aluminum cans increased significantly in 2006 and again in 2007. The prices of glucose, high fructose corn syrup, milk, cream, and certain juice concentrates, particularly apple, increased significantly in 2007. These increased costs, together with increased costs primarily of energy, gas and freight, resulted in increases in certain product costs which are ongoing and are expected to continue to exert pressure on our gross margins in 2008. We are uncertain whether the prices of these or any other raw materials or ingredients will continue to rise in the future.

Generally, raw materials utilized by us in our business are readily available from numerous sources. However, certain raw materials are manufactured by only one company. Sucralose, which is used alone or in combination with Acesulfame-K in our low-calorie products, is purchased by us from a single manufacturer. Certain of our cans are only manufactured by a single company in the United States.

With regard to our Java Monster ™ coffee drinks, the dairy industry is subject to shortages and higher demand from time to time which may result in higher prices.

With regard to fruit juice and juice-drink products, the industry is subject to variability of weather conditions, which may result in higher prices and/or lower consumer demand for juices.

We purchase beverage flavors, concentrates, juices, supplements, cane sugar, sucrose, sucralose and other sweeteners as well as other ingredients from independent suppliers located in the United States and abroad.

Generally, flavor suppliers hold the proprietary rights to their flavors. Consequently, we do not have the list of ingredients or formulae for our flavors and certain of our concentrates readily available to us and we may be unable to obtain these flavors or concentrates from alternative suppliers on short notice. We have identified alternative suppliers of many of the supplements contained in many of our beverages. However, industry-wide shortages of certain fruits and fruit juices, and supplements and sweeteners have been and could, from time to time in the future, be experienced, which could interfere with and/or delay production of certain of our products.

We continually endeavor to develop back-up sources of supply for certain of our flavors and concentrates from other suppliers as well as to conclude arrangements with suppliers which would enable us to obtain access to certain concentrates or flavor formulas in certain circumstances. We have been partially successful in these endeavors. Additionally, in a limited number of cases, contractual restrictions and/or the necessity to obtain regulatory approvals and licenses may limit our ability to enter into agreements with alternative suppliers and manufacturers and/or distributors.

In connection with the development of new products and flavors, independent suppliers bear a large portion of the expense of product development, thereby enabling us to develop new products and flavors at relatively low cost. We have historically developed and successfully introduced new products and flavors and packaging for our products and intend to continue developing and introducing additional new beverages and flavors.

Competition

The beverage industry is highly competitive. The principal areas of competition are pricing, packaging, development of new products and flavors and marketing campaigns. Our products compete with a wide range of drinks produced by a relatively large number of manufacturers, most of which have substantially greater financial, marketing and distribution resources than we do.

Important factors affecting our ability to compete successfully include taste and flavor of products, trade and consumer promotions, rapid and effective development of new, unique cutting edge products, attractive and different packaging, branded product advertising and pricing. We also compete for distributors who will concentrate on selling our products ahead of those of our competitors, provide stable and reliable distribution and secure adequate shelf space in retail outlets. Competitive pressures in the alternative, energy, coffee and functional beverage categories could cause our products to be unable to gain or to lose market share or we could experience price erosion, which could have a material adverse affect on our business and results.

We have experienced substantial competition from new entrants in the energy drink category. A number of companies who market and distribute iced teas and juice cocktails in larger volume packages, such as 16- and 20-ounce glass bottles, including Sobe, Snapple Elements, Arizona and Fuse, have added supplements to their products with a view to marketing their products as “functional” or “energy” beverages or as having functional benefits. We believe that many of those products contain lower levels of supplements and principally deliver refreshment. In addition, many competitive products are positioned differently than our energy or functional drinks. Our smoothies and tea lines are positioned more closely against those products.

We compete not only for consumer acceptance, but also for maximum marketing efforts by multi-brand licensed bottlers, brokers and distributors, many of which have a principal affiliation with competing companies and brands. Our products compete with all liquid refreshments and with products of much larger and substantially better financed competitors, including the products of numerous nationally and internationally known producers such as The Coca-Cola Company, PepsiCo, Inc., Cadbury Schweppes plc, Red Bull Gmbh, Kraft Foods, Inc., Nestle Beverage Company, Tree Top and Ocean Spray. We also compete with companies that are smaller or primarily local in operation. Our products also compete with private label brands such as those carried by grocery store chains, convenience store chains and club stores.

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Our natural sodas compete directly with traditional soda products including those marketed by The Coca-Cola Company, PepsiCo, Inc. and Cadbury Schweppes plc, as well as with carbonated beverages marketed by smaller or primarily local companies such as Jones Soda Co., Clearly Canadian Beverage Company, Crystal Geyser, J.M. Smucker Company and with private label brands such as those carried by grocery store chains, convenience store chains and club stores.

Our fruit juice smoothies compete directly with Kern’s, Jumex, Jugos del Valle and Libby’s nectars, V8 Smoothies, as well as with single serve juice products produced by many competitors. Such competitive products are packaged in glass and PET bottles ranging from 8- to 48-ounces in size and in 11.5-ounce aluminum cans. The juice content of such competitive products ranges from 1% to 100%.

Our apple and other juice products compete directly with Tree Top, Mott’s, Martinelli’s, Welch’s, Ocean Spray, Tropicana, Minute Maid, Langers, Apple and Eve, Seneca, Northland and also with other brands of apple juice and juice blends, especially store brands.

Our energy drinks, including Hansen’s® energy, Diet Red, Monster Energy®, Lost® Energy™, Joker Mad Energy™, Ace™ Energy, Unbound Energy® and Rumba™ energy juice in 8.3-, 16-, 24- and 32-ounce cans, compete directly with Red Bull, Rockstar, Full Throttle, No Fear, Amp, Adrenaline Rush, 180, Extreme Energy Shot, Red Devil, Rip It, NOS, Boo Koo, Vitaminenergy, and many other brands. The Coca-Cola Company and PepsiCo Inc. also market and/or distribute additional products in that market segment such as Pepsi Max, Mountain Dew, Mountain Dew MDX and Vault.

Our Java Monster™ line of non-carbonated dairy based coffee drinks compete directly with Starbucks Frappuccino and other coffee drinks, Rockstar Roasted, Caribou Coffee, Cinnabon coffee drinks and Godiva dairy based drinks.

Sales and Marketing

Our sales and marketing strategy is to focus our efforts on developing brand awareness and trial through sampling both in stores and at events in respect of all our beverages and drink mixes. We use our branded vehicles and other promotional vehicles at events at which we distribute our products to consumers for sampling. We utilize "push-pull" methods to achieve maximum shelf and display space exposure in sales outlets and maximum demand from consumers for our products including advertising, in store promotions and in store placement of point of sale materials and racks, prize promotions, price promotions, competitions, endorsements from selected public and extreme sports figures, coupons, sampling and sponsorship of selected causes such as cancer research and SPCA's as well as of extreme sports teams such as the Pro Circuit – Kawasaki Motocross and Supercross teams, Kawasaki Factory Motocross and Supercross teams, Robby Gordon Racing Team, Kawasaki Factory International Moto GP Team, Kenny Bernstein Drag Racing Team, extreme sports figures and athletes, sporting events such as the Monster Energy® Supercross Series, Monster Energy® Pipeline Pro Surfing competition, Winter and Summer X-games, marathons, 10k runs, bicycle races, volleyball tournaments and other health and sports related activities, including extreme sports, particularly supercross, motocross, freestyle, surfing, skateboarding, wakeboarding, skiing, snowboarding, BMX, mountain biking, snowmobile racing, and also participate in product demonstrations, food tasting and other related events. In store posters, outdoor posters, print, radio and television advertising together with price promotions and coupons, may also be used to promote our brands.

Additionally, in 2003 we entered into a multi-year sponsorship agreement to advertise on the new Las Vegas Monorail ("Monorail Agreement") with the Las Vegas Monorail Company ("LVMC") which includes the right to vend our Monster Energy® drinks and natural sodas on all stations. The initial term of the Monorail Agreement commenced on January 1, 2005 and has been renewed annually thereafter, with renewals at a lower annual rate. We have renewed the agreement for 2008.

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We believe that one of the keys to success in the beverage industry is differentiation such as making our products visually distinctive from other beverages on the shelves of retailers. We review our products and packaging on an ongoing basis and, where practical, endeavor to make them different, better and unique. The labels and graphics for many of our products are redesigned from time to time to maximize their visibility and identification, wherever they may be placed in stores and we will continue to reevaluate the same from time to time.

Where appropriate we partner with retailers to assist our marketing efforts. For example, while we retain responsibility for the marketing of the Juice Slam® line of children's multi-vitamin juice drinks, Costco has undertaken partial responsibility for the marketing of the Juice Blast® line.

We increased expenditures for our sales and marketing programs by approximately 48% in 2007 compared to 2006. As of December 31, 2007, we employed 713 employees in sales and marketing activities, of which 269 were employed on a full-time basis.

Customers

Our customers are typically retail grocery and specialty chains, wholesalers, club stores, drug chains, mass merchandisers, convenience chains, full service beverage distributors, health food distributors and food service customers. Gross sales to our various customer types for the years ended December 2007, 2006 and 2005 are reflected below. The allocations below reflect changes made by us to the categories historically reported.

	2007	2006	2005
Retail Grocery, specialty chains and wholesalers	8%	12%	19%
Club stores, drug chains & mass merchandisers	14%	14%	11%
Full service distributors	73%	69%	65%
Health food distributors	2%	2%	3%
Other	3%	3%	2%

Our customers include Cadbury Schweppes Bottling Group (formally known as Dr. Pepper Bottling/7UP Bottling Group), Wal-Mart, Inc. (including Sam's Club), AB, Kalil Bottling Group, Trader Joe's, John Lenore & Company, Pepsi Canada, Swire Coca-Cola, USA, Costco, The Kroger Co., Safeway Inc. and Albertsons. A decision by any large customer to decrease amounts purchased from us or to cease carrying our products could have a material negative effect on our financial condition and consolidated results of operations. Cadbury Schweppes Bottling Group, a customer of the DSD division, accounted for approximately 16%, 19% and 18% of our net sales for the years ended December 31, 2007, 2006 and 2005, respectively. Wal-Mart, Inc. (including Sam's Club), a customer of both the DSD and Warehouse divisions, accounted for approximately 12% of our net sales for each of the years ended December 31, 2007 and 2006, respectively.

Seasonality

Sales of ready-to-drink beverages are somewhat seasonal, with the second and third calendar quarters accounting for the highest sales volumes. The volume of sales in the beverage business may be affected by weather conditions. Sales of our beverage products may become increasingly subject to seasonal fluctuations as more sales occur outside of California with respect to our products. However, the energy drink category appears to be less seasonal than traditional beverages. As the percentage of our sales that are represented by such products continues to increase, seasonal fluctuations will be further mitigated. Quarterly fluctuations may also be affected by other factors, including the introduction of new products, the opening of new markets where temperature fluctuations are more pronounced, the addition of new bottlers and distributors, changes in the mix of sales of our finished products and changes in and/or increased advertising, marketing and promotional expenses.

Intellectual Property

We own numerous trademarks that are very important to our business. Depending upon the jurisdiction, trademarks are valid as long as they are in use and/or their registrations are properly maintained and they have not been found to have become generic. Registrations of trademarks can generally be renewed as long as the trademarks are in use. We also own the copyright in and to numerous statements made and content appearing on the packaging of our products.

We own the Hansen's®, Monster Energy®, M (stylized)® and the M Monster Energy® trademarks. These trademarks are crucial to our business and are registered in the U.S. Patent and Trademark Office and in various countries throughout the world. We own a number of other trademark registrations including, but not limited to, A New Kind a Buzz®, Unleash the Beast!®, Hansen's Energy®, Blue Energy®, Energade®, Hansen's E $_2$ O Energy Water®, Hansen's Slim Down®, Power Formula®, The Real Deal®, Liquidfruit®, California's Natural Choice®, Medicine Man®, Hansen's Power®, B • Well®, Anti-ox®, D-stress®, Stamina®, Immunejuice®, Hansen's Natural Multi-Vitamin Juice Slam®, Juice Blast®, Red Rocker®, and Hansen's Natural Soda® in the United States and, the Monster®, Monster Energy®, M(stylized)®, Hansen's® and Smoothie® trademarks in a number of countries around the world.

We have applied to register a number of trademarks in the United States and elsewhere including, but not limited to, Monster™, Monster Energy™, M(stylized)™, Assault™, Khaos™, Monster M-80™, Predator™, M Monster Mutant™, Joker Mad Energy™, Ace™, Rumba™, Fizzit™ and Fizz Bomb™, Java Monster™, Mean Bean™, Java Monster Big Black™, Loca Moca™, Chai Hai™, Irish Blend™, Java Monster Russian™, Nut-Up™, Lo-Ball™, The Juice is Loose™, Monster MIXXD™, Monster Heavy Metal™ and Energy Pro™.

In September 2000, in connection with the acquisition of the Blue Sky Natural Beverage business, we acquired the Blue Sky® trademark which is registered in the United States and Canada, through our wholly owned subsidiary Blue Sky.

In May 2001, in connection with the acquisition of the Junior Juice beverage business, we acquired the Junior Juice® trademark, which is registered in the United States, through our wholly owned subsidiary Junior Juice.

In October 2006, we acquired the Unbound Energy® trademark which is registered in the United States.

Government Regulation

The production, distribution and sale in the United States of many of our products is subject to the Federal Food, Drug and Cosmetic Act; the Dietary Supplement Health and Education Act of 1994; the Occupational Safety and Health Act; various environmental statutes; and various other federal, state and local statutes and regulations applicable to the production, transportation, sale, safety, advertising, labeling and ingredients of such products. California law requires that a specific warning appear on any product that contains a component listed by the State of California as having been found to cause cancer or birth defects. The law exposes all food and beverage producers to the possibility of having to provide warnings on their products because the law recognizes no generally applicable quantitative thresholds below which a warning is not required. Consequently, even trace amounts of listed components can expose affected products to the prospect of warning labels. Products containing listed substances that occur naturally in the product or that are contributed to the product solely by a municipal water supply are generally exempt from the warning requirement. While none of our beverage products are required to display warnings under this law, we cannot predict whether an important component of any of our products might be added to the California list in the future. We also are unable to predict whether, or to what extent, a warning under this law would have an impact on costs or sales of our products.

Measures have been enacted in various localities and states that require that a deposit be charged for certain non-refillable beverage containers. The precise requirements imposed by these measures vary. Other deposit, recycling or product stewardship proposals have been introduced in certain states and localities and in Congress, and we anticipate that similar legislation or regulations may be proposed in the future at the local, state and federal levels, both in the United States and elsewhere.

Our facilities in the United States are subject to federal, state and local environmental laws and regulations. Compliance with these provisions has not had, and we do not expect such compliance to have, any material adverse effect upon our capital expenditures, net income or competitive position.

Employees

As of December 31, 2007, we employed a total of 904 employees of which 448 were employed on a full-time basis. Of our 904 employees, we employ 191 in administrative and operational capacities and 713 persons in sales and marketing capacities. We have not experienced any work stoppages and we consider relations with our employees to be good.

Compliance with Environmental Laws

In California, we are required to collect redemption values from our customers and to remit such redemption values to the State of California Department of Conservation based upon the number of cans and bottles of certain carbonated and non-carbonated products sold. In certain other states and Canada where Hansen's® products are sold, we are also required to collect deposits from our customers and to remit such deposits to the respective state agencies based upon the number of cans and bottles of certain carbonated and non-carbonated products sold in such states.

Available Information

Our Internet address is www.hansens.com. Information contained on our website is not part of this annual report on Form 10-K. Our annual report on Form 10-K and quarterly reports on Form 10-Q will be made available free of charge on www.hansens.com , as soon as reasonably practicable after we electronically file such material with, or furnish it to, the Securities and Exchange Commission (the "SEC"). In addition, you may request a copy of these filings (excluding exhibits) at no cost by writing or telephoning us at the following address or telephone number:

Hansen Natural Corporation
550 Monica Circle, Suite 201
Corona, CA 92880
(951) 739-6200
(800) HANSENS
(800) 426-7367

EXHIBIT 4

ROCKSTAR ENERGY DRINK

PINK OR PUNK
CELEBRITIES
HALLOWEEN
HOLIDAY PARTY
UPDATED
EVENTS

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- INGREDIENTS
- PRODUCTS
- THE COMPANY
- DISTRIBUTION
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The world's most powerful energy drink just got more powerful. We've stepped up the energy with 50% more caffeine and cut the carbs and calories to keep those with active lifestyles lean and fully charged! Enjoy this lightly carbonated, totally refreshing wild berry flavored beverage super chilled.
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ROCKSTAR ZERO CARB
ENERGY DRINK

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NEW PHOTOS - back from our RV Teams as they travel the country and charge the ROCKSTAR events

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home >> products >> sugar free 24 ounce can

Triple Strength
THE 24 OZ.
Triple Size
SUGAR FREE
ROCKSTAR
ENERGY DRINK
party like a rockstar
24 fl/oz (710ml)

ROCKSTAR SUGAR FREE 24 oz

The Original 24 Ounce Energy Drink! ROCKSTAR was the first to break the mold of the small can and change Energy Drinks forever. Scientifically formulated for those who lead active and exhausting lifestyles, from athletes to rock stars.

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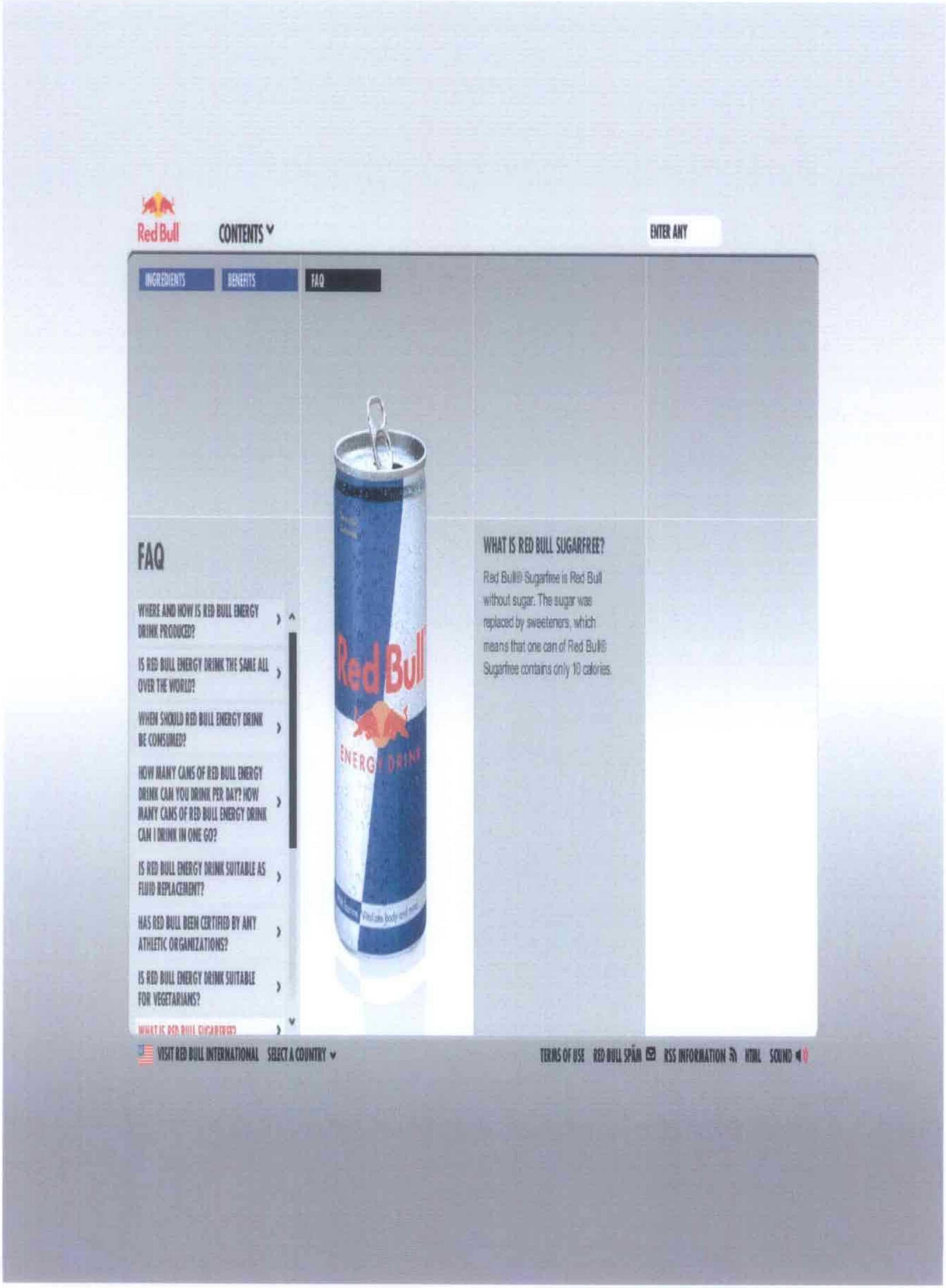
products


Red Bull
CONTENTS
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BENEFITS
FAQ
FAQ
WHERE AND HOW IS RED BULL ENERGY DRINK PRODUCED?
IS RED BULL ENERGY DRINK THE SAME ALL OVER THE WORLD?
WHEN SHOULD RED BULL ENERGY DRINK BE CONSUMED?
HOW MANY CANS OF RED BULL ENERGY DRINK CAN YOU DRINK PER DAY? HOW MANY CANS OF RED BULL ENERGY DRINK CAN I DRINK IN ONE GO?
IS RED BULL ENERGY DRINK SUITABLE AS FLUID REPLACEMENT?
HAS RED BULL BEEN CERTIFIED BY ANY ATHLETIC ORGANIZATIONS?
IS RED BULL ENERGY DRINK SUITABLE FOR VEGETARIANS?
Red Bull
ENERGY DRINK
WHAT IS RED BULL SUGARFREE?
Red Bull® Sugarfree is Red Bull without sugar. The sugar was replaced by sweeteners, which means that one can of Red Bull® Sugarfree contains only 10 calories.
VISIT RED BULL INTERNATIONAL
SELECT A COUNTRY
TERMS OF USE
RED BULL SPÄM
RSS INFORMATION
HTML
SOUND

HOME
THE DRINK
FREE STUFF
NO FEAR
EVENTS
GEAR
EXPERIENCE
THE DRINK.
L-CARNITINE
NO FEAR
SUPER ENERGY
SUPPLEMENT
SUGAR FREE
Serving Size: 8 fl.oz (240mL)
Servings Per Container: 2
Serving Size 8 fl. oz %DV*
Calories 10
Sodium 100mg 4%
Potassium 30mg 1%
Total Carb 1g 0%
Sugars 0g *
Protein 1g *
Vitamin C 60mg 100%
Folic Acid 40mcg 10%
Vitamin B6 2mg 100%
Vitamin B12 6mcg 100%
Selenium 7mcg 10%
Taurine 1000mg 10%
Inositol 100mg *
Caffeine 77mg *
Panax Ginseng Extract 50mg *
Guarana Extract 50mg *
Grape Seed Extract 25mg *
L-Carnitine 25mg *
L-Arginine 10mg *
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PURCHASE DRINK

Full Throttle
ENERGY DRINK
SUGAR FREE/LOW CALORIE
LOW SODIUM, 140mg OR LESS PER 240mL (8fl oz)
Nutrition Facts
Serving Size 16 fl oz (473 mL)
Servings Per Container 1
Amount Per Serving
Calories 10
% Daily Value*
Total Fat 0g 0%
Sodium 170mg 7%
Total Carbohydrate 0g 0%
Sugars 0g
Protein less than 1g (Not a significant source of protein)
Niacin 100% Vitamin B6 200%
Vitamin B12 200%
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, sugars, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
LOW SODIUM, 140mg OR LESS PER 240mL (8fl oz)
Nutrition Facts
Serving Size 16 fl oz (473 mL)
Servings Per Container 1 Can
Amount Per Serving
Calories 220
% Daily Value*
Total Fat 0g 0%
Sodium 160mg 7%
Total Carbohydrate 57g 19%
Sugars 57g
Protein 1g (Not a significant source of protein)
Niacin 100% Vitamin B6 200%
Vitamin B12 200%
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
Full Throttle ZERO
ZERO
FULL THROTTLE BLEND
Guarana & Ginseng Extracts
Carnitine Caffeine Taurine
Full Throttle ORIGINAL
ORIGINAL
FULL THROTTLE BLEND
3,000mg
Guarana & Ginseng Extracts
Carnitine Sucrose
Caffeine Taurine
close
HOME NHRA PRODUCTS: ORIGINAL+ZERO BLUE DEMON FURY HYDRATION
GO FULL THROTTLE OR GO HOME

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Muscle Milk® Performance Proteins Endurance and Recovery Energy Joint Health Collegiate

ENERGY DRINK
10.5 FL.OZ.
View more
Energy

Xcyto™ Energy Drink

Overview Benefits and Use Supplemental / Nutritional Facts Add To Cart

Sugar Free

Nutrition Facts
Serving Size 1 can

Amount Per Serving	
Calories 10	
	% Daily Value*
Total Fat 0g	0%
Sodium 35mg	1%
Total Carbohydrate 2g	1%
Sugars 0g	
Protein Less than 1g	
Vitamin C 100%	Vitamin B12 80%
Niacin 100%	Pantothenic Acid 50%
Vitamin B6 250%	Chromium 100%

Not a significant source of calories from fat, saturated fat, cholesterol, dietary fiber, vitamin A calcium and iron.

* Percent Daily Values are based on a 2,000 calorie diet.

Regular

Nutrition Facts
Serving Size 1 can

Amount Per Serving	
Calories 140	
	% Daily Value*
Total Fat 0g	0%
Sodium 35mg	1%
Total Carbohydrate 36g	12%
Sugars 35g	
Protein Less than 1g	
Vitamin C 100%	Vitamin B12 80%
Niacin 100%	Pantothenic Acid 50%
Vitamin B6 250%	Chromium 100%

Not a significant source of calories from fat, saturated fat, cholesterol, dietary fiber, vitamin A calcium and iron.

* Percent Daily Values are based on a 2,000 calorie diet.

2 Killer Varieties

- Regular
- Sugar Free

** These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.*

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IN THE CAN

- CRUNK!!! Original
- **SUGAR FREE CRUNK!!!**
- Ingredients
- CRUNK!!!OLOGY
- Drink Recipes

SUGAR FREE CRUNK!!!

Sugar-Free CRUNK!!!

Now you can get the kick without all the calories. Sugar free CRUNK!!! has the same refreshing flavor of **natural pomegranate** without all the sugar. You don't need it and you won't miss it!!!

Selected Nutrition Facts
Serving Size: 8 fl. oz (237ml)
Servings Per Container: 1

Amount Per Serving – % Daily Value*
Vitamin C – 30mgs. (50%)
Vitamin E – 7.5Iu (25%)
Vitamin B1 – 1.5mgs. (25%)
Vitamin B2 – 1.7mgs. (100%)
Vitamin B3 – 20mgs. (100%)
Vitamin B6 – 2mgs. (100%)
Vitamin B12 – 6mcg. (100%)
Vitamin B5 – 10mgs. (5%)
Calcium – 50mgs. (5%)
Magnesium – 12mgs. (4%)
Selenium – 5mcg. (5%)
Sodium – 115mgs. (5%)

* Percent Daily Values are based on a 2,000 calorie diet

View Complete Nutrition Facts

SUGAR FREE
CRUNK!!!
ENERGY DRINK
WITH ASHWAGANDA

16oz and 8oz SUGAR FREE CRUNK!!!

CRUNK HOUSE
GET CRUNK!!! ON CAMPUS

CRUNK!!! STORE

FOR CRUNK!!! EVENTS, PROMO'S & NEWS
TEXT "ENERGY" TO CRUNK
(27865)

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Boink : : Frequently Asked Questions - Windows Internet Explorer

http://www.boinkenergy.com/faqs.php

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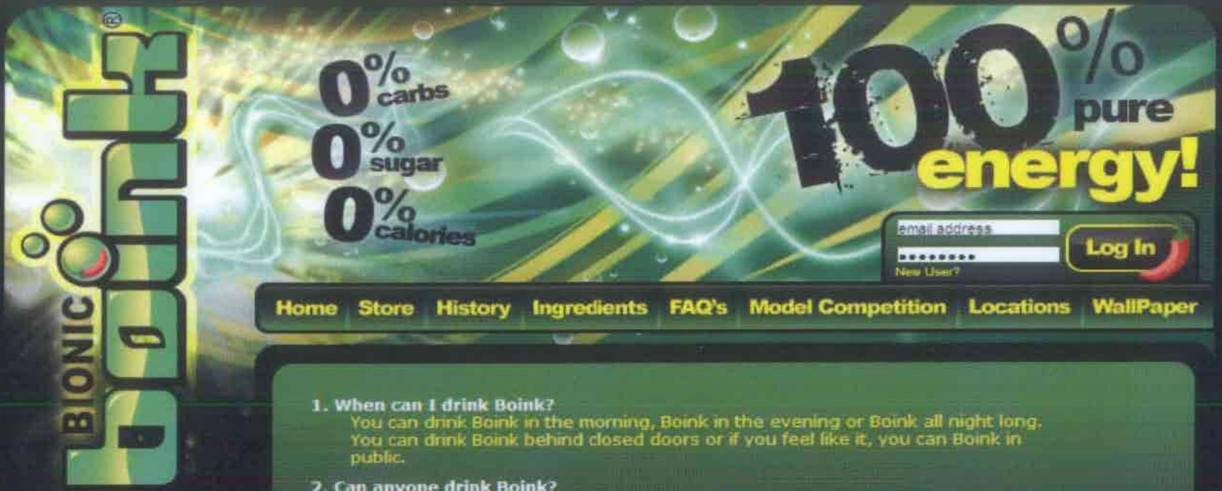
Boink : : Frequently Asked Questions



Home | Store | History | Ingredients | FAQ's | Model Competition | Locations | WallPaper

1. **When can I drink Boink?**
   You can drink Boink in the morning, Boink in the evening or Boink all night long. You can drink Boink behind closed doors or if you feel like it, you can Boink in public.

2. **Can anyone drink Boink?**
   Anyone can drink Boink, but everyone should Boink responsibly. Even though the ingredients in Boink are healthy and safe to consume, green tea and gotu kola contain naturally occurring caffeine. It's not recommended for young children. People that are sensitive to caffeine and pregnant women should consult their physician before consuming any energy drink, including Boink.

3. **How many can I drink a day?**
   With so much Boink and so little time, you can drink Boink as much as you want, but as mentioned above, everyone should Boink responsibly!

4. **If I'm a couch potato, will Boink give me energy?**
   Yes! Boink is formulated with ingredients that may give you energy without giving you the 'jitters'. However, each individual is different. Depending on a person's metabolism and diet, the effects of Boink can be stronger for some people and lesser for others.

5. **What are the exact ingredients in Boink?**
   It's a well-kept secret so, what happens in Boink stays in Boink. Boink has a superior formula with extraordinary ingredients. Go to Ingredients for detailed information.

6. **I'm trying to trim down and get healthy, can I drink Boink?**
   Yes! Boink contains 0% carbs, 0% sugars 0% calories and 0% fat. Research indicates that the ingredients in Boink may stimulate mental alertness, aid in weight loss by stimulating metabolism, increase longevity and performance levels, improve muscle tone, help increase and improve circulation, reduce cholesterol levels, strengthen the heart, aid in good digestion and help maintain a healthy nervous system.

7. **Can Boink be mixed with alcohol?**
   Are you kidding? Of course!!!! Please remember everyone should drink Alcohol and Boink responsibly!

Internet 100%

Damzl
FUEL
TM
HOME
ABOUT US
EVENTS
MYSPACE
INGREDIENTS
DEALERS
GALLERY
VIDEO
FUEL LOCATOR
LINK
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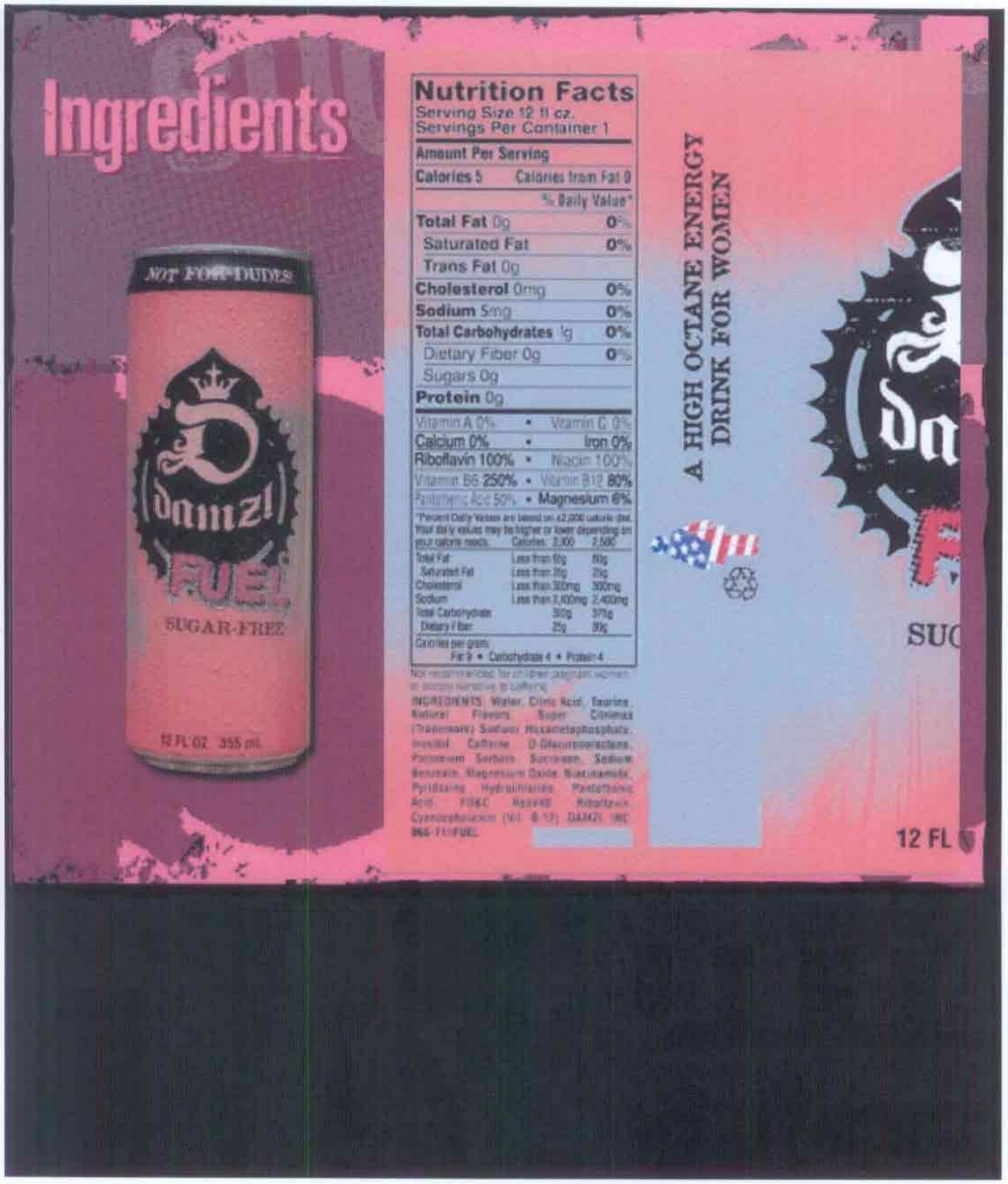
BIOS
BUY FUEL
WRAPZ


Ingredients
NOT FOR DUDES
Damzl
FUEL
SUGAR-FREE
12 FL OZ 355 mL
Nutrition Facts
Serving Size 12 fl oz.
Servings Per Container 1
Amount Per Serving
Calories 5 Calories from Fat 0
% Daily Value*
Total Fat 0g 0%
Saturated Fat 0%
Trans Fat 0g
Cholesterol 0mg 0%
Sodium 5mg 0%
Total Carbohydrates 1g 0%
Dietary Fiber 0g 0%
Sugars 0g
Protein 0g
Vitamin A 0% • Vitamin C 0%
Calcium 0% • Iron 0%
Riboflavin 100% • Niacin 100%
Vitamin B6 250% • Vitamin B12 80%
Magnesium 6%
A HIGH OCTANE ENERGY
DRINK FOR WOMEN
SUG
12 FL

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PRODUCTS
COMMUNITY
INFO
dopamine
vegas in a can
energy drink
Nutritional Facts
Serving Size 8.4 fl. oz.
Serving Per Container 1
Amount Per Serving
Calories 0 Calories from fat 0
% Daily Value
Total Fat 0g 0%
Saturated Fat 0g 0%
Trans Fat 0g
Cholesterol 0mg 0%
Sodium 15mg 1%
Total Carbohydrate 0g 0%
Dietary Fiber 0g 0%
Sugars 0g
Protein 0g
Vitamin A 0% Vitamin C 0%
Diet Dopamine Energy Drink
SUGAR FREE
« drag »
ORIGINAL FLAVOR
(not diet)
ALL RIGHTS RESERVED, LOUNGE BEVERAGES LLC. 2008

Jump
Vital Energy
Coffee Energy Drink

In a category by itself, Jump Coffee Cola has more stimulant effect than its leading competitors and will enhance energy, attention and focus in your everyday life. This powerful coffee cola is a formula of natural caffeine, essential vitamins and coffee with cola and vanilla flavors. We've created a product with both good taste and a stimulant effect that is not masked by what coffee lovers love best...COFFEE!!!

Jump Start Your Day!

Nutrition Facts
Serving Size 1 can (310 ml)

Amount Per Serving	
Calories 0	
	% Daily Value*
Total Fat 0g	0%
Sodium 25mg	1%
Total Carbohydrate 0g	0%
Sugars 0g	
Protein 0g	
Vitamin C	100%
Niacin	100%
Vitamin B6	190%
Vitamin B12	175%
Pantothenic Acid	50%

*Percent Daily Values are based on a 2,000 calorie diet.

*When used in conjuction with increased exercise and a reduced calorie diet. These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

Recon
Deliberate Energy
Coffee Cola

A high energy drink consisting of natural caffeine, essential vitamins, coffee with cola & vanilla flavors. Caffeine like you've NEVER had before!

Sentinel
Vigilant Energy
Citrus Flavored Drink

This energy packed drink is a compound of grapefruit, citrus tangerine and a clean, crisp taste that separates itself from all others.

Jump
Vital Energy
Coffee Energy Drink

Extreme caffeine without the bitter aftertaste. This Coffee Cola will help you Jump start your day!

Hot
Pure Energy
Berry Flavored Drink

A refreshing berry flavored energy drink that BURNS CALORIES and gets you through the day. Release your inner heat!

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Site Design by Green Chair

-
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- PRODUCT
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KING 888 SUGAR FREE

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Ingredients and Nutrition Facts back to assortment

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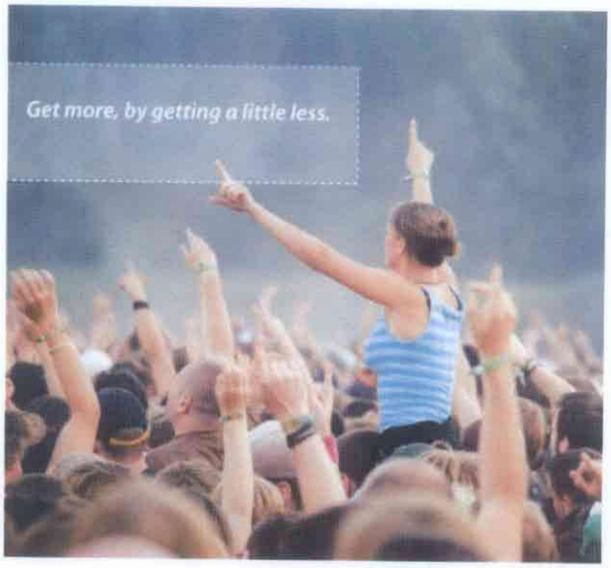
sugar free drink

Real, lasting energy comes from more than just sugar. And so for all of you who are watching that energy depleted figure, we offer a delicious sugar-free alternative. With the same sweet taste, this drink delivers what you need and not what you don't - the calories.



WTF is a Mana Energy Potion?
Mana Energy Potion is the premium energy shot made by gamers for gamers. It's for long nights of gaming, partying, and the longer mornings that follow. It has lots of vitamins, no sugar, and no aftercrash.

What is it going to do to me?
It will bump up your mana to +160 (real world humans have about 100 mana, by the way). It's 5-8 hours of smooth, jitter-free energy. When it comes to caffeine content, this potent shot is equivalent to about two 8-ounce Red Bulls® or four cups of crappy office coffee.

How big is a Mana Energy Potion?
It is an energy shot, not an energy drink. The bottle is a 50mL serving which is around the same size as those little bottles of booze served on airplanes. At only 20 calories, it won't weigh you down while you are casting spells. It will also keep you away from the can as opposed to guzzling the usual barrel of yellow syrup. Don't let the size fool you- even drinking half a bottle at time is quite effective.

What's the best way to ingest this stuff?
Straight from the bottle. If you want the energy to ramp up more slowly but still last as long, have a bottle after a meal. Don't be afraid to only take half a bottle, this is a high-level potion, so you should be careful with it. You can also dilute it (See "What

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SMARTPOWER energy drink : SmartPower Ingredients

Both of our **SmartPower**™ Energy Drinks have the same patent pending, breakthrough energy formula that makes them simply ***feel better*** than normal energy drinks, offering:

ALL the **ENERGY**
with *NO JITTERS*
and *NO CRASH*

180 mg of caffeine per can. Please drink responsibly.
Even though our SmartPower™ drinks don't get you jacked up and jagged like normal energy drinks, they do contain more caffeine than the leading brands.

Supplemental Facts
Serving Size 8.0 Fl.oz (240 ml)
Servings per container: 2
Amount Per Serving %Daily Value*
Calories 5
Total Fat 0g
Total Carbs 2g 0%
Sugar 0g
Sodium 200 mg 9%
Vitamins B6,B12 100%
Ingredients: Carbonated Water, Natural Flavors, Citric Acid, Taurine, Sodium Citrate, Sucralose, N-Acetyl-L-Tyrosine, L-Theanine, Panax Ginseng, Eleuthero, DL-Phenylalnine, Caffeine, Acesulfame Potassium, Potassium Sorbate, Sodium Benzoate, Theobromine, Guarana, Yerba Mate, Pyroxidine, Cyanocobalamin
* - % Daily Value is based on a 2000 calorie diet
PLEASE CONSUME RESPONSIBLY
6 89076 15284 6

The Great SmartPower Taste: Are You A Genius Or A Waste-oid?

While both **SmartPower**™ Energy Drinks have similar flavoring, and taste like "fresh berries with a hint of vanilla" our fans tend to prefer one flavor over the other, and have been know to argue passionately about why their preferred flavor is better than the other:

> *SmartPower tastes 'cleaner' and isn't as sweet as Nuclear Waste Antidote," says one group. "It's more refreshing because it is lighter and crisper."*

> *"Well, Nuclear Waste Antidote packs more of a punch and is more explosive in your mouth," says the other, "It more refreshing because it is more intense and fruity."*

Fortunately, to our knowledge, no one has yet come to blows about it! We like to call those who prefer the taste of **SmartPower**™ "Geniuses" and those who prefer the taste of **Nuclear Waste Antidote**™ "Waste-oids."

[Here in the SEE Inc. offices, we tend to be Waste-oids and have an ice-cold blast of **Nuclear Waste Antidote**™ for breakfast and be Geniuses with a chilled/chilling **SmartPower**™ in the afternoons.]

The one thing that both Waste-oids and Geniuses agree about is that neither drink has the negative aftertaste that most energy drinks have.

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Adrenaline
RUSH
high performance energy supplement
SoBe
Adrenaline
RUSH
SUGAR FREE
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SUPPLEMENT FACTS

Serving Size:
Servings Per Container:

Amount Per Serving

% Daily Value*

Sodium
Potassium
Total Carb
Sugars

Vitamin C

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ENERGY
More caffeine than Monster Lo-Carb* or Diet RockStar (Original)* plus our proprietary blend of Ginseng, Guarana seed extract and B-Vitamins provides an energy buzz with zero sugar!
HEALTH
Packed with Antioxidant Goodness from Vitamins A & E and Green Tea Extract. Plus, BURN adds Potassium as an electrolyte, and it's extremely low in Sodium.
SUGAR FREE
burn
drink good. feel good. look good.
16oz. 473ml
FEEL THE BURN
Combine EGCG (from Green Tea Extract), Calcium and Caffeine, and you get a nice boost in your metabolism! Coincidentally, Sugar-Free BURN is formulated with those exact ingredients, giving a whole new meaning to "energy to burn!"
Built from the ground up to be the healthiest, best tasting energy drink you can buy, BURN gives you the energy to do what's important to you...
...and that's what we call
energy for the good life!
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Quantity: 1

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The Ultra Premium Sugar Free, Zero Calorie, Xen Energy Drink

An extreme blend of ingredients developed especially for periods of increased mental and physical exertion.†

Quick energy for any situation: sports, work, studying, driving, socializing.†

Maximum energy to stimulate the metabolism, elevate performance & enhance mental concentration.†

Loaded with the wake-up power of caffeine, the alertness-inducing properties of taurine, the lift from B6 & B12.†

All Natural Flavors & Colors.

Zero Calories.

†These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent disease.

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EXHIBIT 5

Hansen's Natural

Products

Dazzling Crowds,
Quenching Thirsts

Hansen's Natural Soda...
fruit never had it so good.

Hansen's & Youth Sports

Energy Water

Energy Water brings the full force of 21st century science to the water beverage category. E2O infuses the natural thirst quenching qualities of purified water with an energy boost fueled by Ginseng Taurine B Vitamins Electrolytes Glucose and more! As with all Hansen's beverages refreshing flavor is the ultimate reason you will drink E2O again and again. E2O offers a variety of light crisp natural fruit flavors to highlight it's clean fresh purified water.

E20 Green Tea

Contains:
filtered water, glucose, citric acid, potassium phosphate, magnesium oxide, vitamin c, taurine, splenda® (sucralose), natural flavors, panax ginseng, acesulfame potassium, niacin, vitamin b5, vitamin b12, vitamin b6.

Nutrition Facts:
Amount Per Serving: Calories 10, Total Fat 0g (0% DV), Sodium 5mg (0% DV), Total carb 3g (1% DV), Sugars 3g, Potassium 40mg (1% DV), Protein 0g, Vitamin C 50%,Vitamin B6 25%, Magnesium 10%, Niacin 25%, Vitamin B12 25%, Vitamin B5 25%, Calcium 10%, Iron 0%.

E20 Tangerine

Contains:
filtered water, glucose, citric acid, natural flavors, potassium phosphate, magnesium oxide, vitamin c, taurine, splenda® (sucralose), panax ginseng, acesulfame potassium, niacin, vitamin b5, vitamin b12, vitamin b6.

Nutrition Facts:
Amount Per Serving: Calories 10 Total Fat 0g (0% DV) Sodium 5mg (0% DV) Total carb 3g (1% DV) Sugars 3g Potassium 40mg (1% DV) Protein 0g Vitamin C 50%,Vitamin B6 25% Magnesium 10% Niacin 25% Vitamin B12 25% Vitamin B5 25% Calcium 10% Iron 0%.

E20 Lemon

Contains:
filtered water, glucose, citric acid, potassium phosphate, magnesium oxide, vitamin c, taurine, splenda® (sucralose), natural flavors, panax ginseng, acesulfame potassium, niacin, vitamin b5, vitamin b12, vitamin b6.

Nutrition Facts:
Amount Per Serving: Calories 10 Total Fat 0g (0% DV) Sodium 5mg (0% DV) Total carb 3g (1% DV) Sugars 3g Potassium 40mg (1% DV) Protein 0g Vitamin C 50%,Vitamin B6 25% Magnesium 10% Niacin 25% Vitamin B12 25% Vitamin B5 25% Calcium 10% Iron 0%.

E20 Berry

Contains:
filtered water, glucose, citric acid, potassium phosphate, magnesium oxide, vitamin c, taurine, splenda® (sucralose), natural flavors, panax ginseng, acesulfame potassium, niacin, vitamin b5, vitamin b12, vitamin b6.

Nutrition Facts:
Amount Per Serving: Calories 10, Total Fat 0g (0% DV), Sodium 5mg (0% DV), Total carb 3g (1% DV), Sugars 3g, Potassium 40mg (1% DV), Protein 0g, Vitamin C 50%,Vitamin B6 25%, Magnesium 10%, Niacin 25%, Vitamin B12 25%, Vitamin B5 25%, Calcium 10%, Iron 0%.

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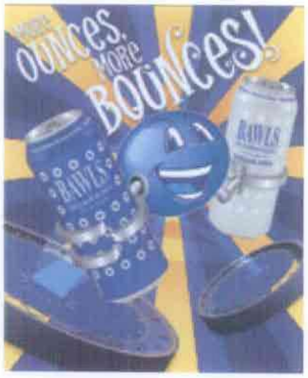
EXHIBIT 6

BAWLS GUARANA



BAWLS Guarana Enters 16oz Market with BREAKTHROUGH Textured can.

Made from guarana, a highly caffeinated berry native to the Amazonian rainforest, BAWLS Guarana is the carbonated beverage of tomorrow with an extra kick.

Since its inception, BAWLS Guarana's popularity has been growing across the country and the rest of the world, finding a huge fan base from people from all walks of life who enjoy the clean, crisp taste of guarana along with a powerful rush of caffeine.

Ingredients: Carbonated Water, Corn Syrup, Citric Acid, Natural Guarana Flavor, Sodium Benzoate (as a preservative), Caffeine, Artificial Flavors and Caramel Color.

Nutrition Facts:
BAWLS Guarana 10 fl. oz
Serving size: 1 bottle; Calories 120; Total fat 0g; Sodium 35mg; Total carbohydrate 32g; sugars 32g; Protein 0g;

BAWLS Guarana 16 fl. oz

Serving size: 8 fl oz (2 servings per can) Calories 90; Total fat 0g; Sodium 30mg; Total carbohydrate 25g; sugars 25g; Protein 0g;

Warning: This product contains high levels of caffeine.

4-pack cartons available at Target stores!

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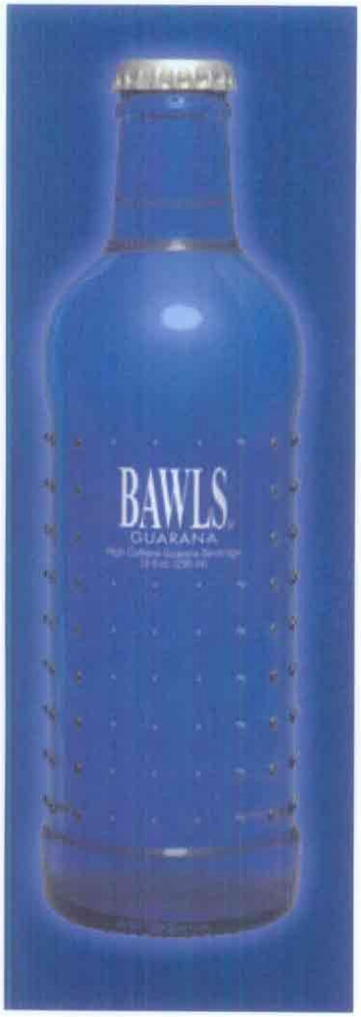
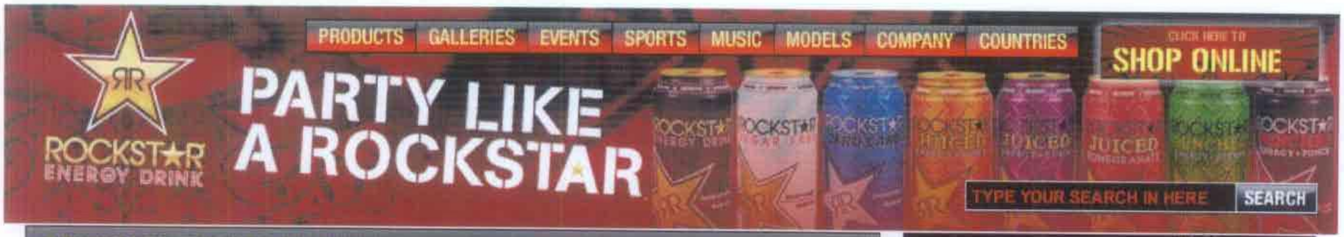

BAWLS
GUARANA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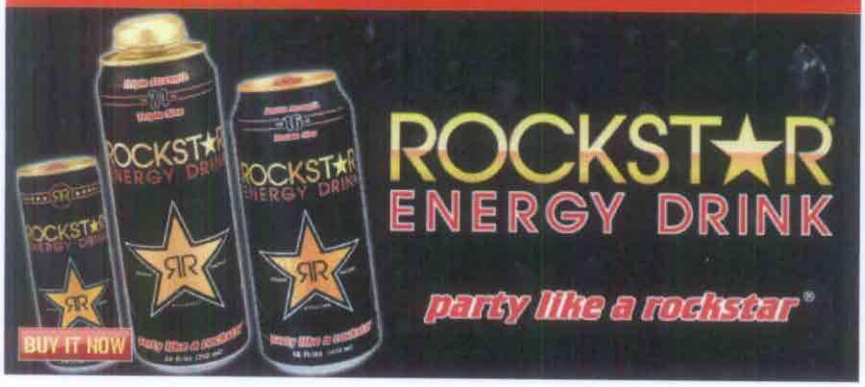
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Bigger. Better. Faster. Stronger. ROCKSTAR is the world's most powerful energy drink. Enhanced with the potent herbal blend of Guarana, Ginkgo, Ginseng and Milk Thistle, ROCKSTAR is scientifically formulated to provide an incredible energy boost for those who lead active and exhausting lifestyles–from athletes to rock stars. Enjoy this fully refreshing lightly carbonated beverage super chilled.

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PUNCHED

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Full Throttle
ENERGY DRINK
SUGAR FREE/LOW CALORIE
LOW SODIUM, 140mg OR LESS PER 240mL (8fl oz)
Nutrition Facts
Serving Size 16 fl oz (473 mL)
Servings Per Container 1
Amount Per Serving
Calories 10
% Daily Value*
Total Fat 0g 0%
Sodium 170mg 7%
Total Carbohydrate 0g 0%
Sugars 0g
Protein less than 1g (Not a significant source of protein)
Niacin 100% Vitamin B6 200%
Vitamin B12 200%
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, sugars, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
LOW SODIUM, 140mg OR LESS PER 240mL (8fl oz)
Nutrition Facts
Serving Size 16 fl oz (473 mL)
Servings Per Container 1 Can
Amount Per Serving
Calories 220
% Daily Value*
Total Fat 0g 0%
Sodium 160mg 7%
Total Carbohydrate 57g 19%
Sugars 57g
Protein 1g (Not a significant source of protein)
Niacin 100% Vitamin B6 200%
Vitamin B12 200%
Not a significant source of calories from fat, saturated fat, trans fat, cholesterol, dietary fiber, vitamin A, vitamin C, calcium and iron.
*Percent Daily Values are based on a 2,000 calorie diet.
Full Throttle ZERO ENERGY DRINK
ZERO
FULL THROTTLE BLEND
Guarana & Ginseng Extracts
Carnitine Caffeine Taurine
Full Throttle ORIGINAL ENERGY DRINK
ORIGNAL
FULL THROTTLE BLEND
3,000mg
Guarana & Ginseng Extracts
Carnitine Sucrose
Caffeine Taurine
close
HOME NHRA PRODUCTS: ORIGINAL+ZERO BLUE DEMON FURY HYDRATION
GO FULL THROTTLE OR GO HOME

EXHIBIT 7

HighBeam Research

Title: Juiced energy drinks still give jolt, crash

Date: 3/21/2007; **Publication**: University Wire; **Author**: Mike Menninger

University Wire

03-21-2007

(The Daily Aztec) (U-WIRE) SAN DIEGO -- When someone drinks a Monster or a Rockstar, he gets a feeling of increased alertness and awareness. The feeling of a good buzz leads one into believing he can do anything with newfound strength and endurance.

But what he doesn't realize is that he's being tricked into believing he has more energy and that buzz is the body's reaction to the sudden ingestion of sugar and caffeine. The drinker often comes down hard off that high -- a condition referred to as "jolt and crash."

What keeps him from chugging drink after drink is the bitter taste. To combat this, Monster and Rockstar have introduced concoctions that contain natural fruit juices to offset that unpleasantness. But are these beverages any healthier than their predecessors, or are they just a way to make them more appealing to consumers? With so little research done by the Food and Drug Administration, it leans toward the latter.

The main ingredients in energy drinks are carbonated water, sugar and caffeine, as well as some vitamins and herbal supplements. All are intended to energize the body and stimulate the mind, but what consumers don't realize is that the amounts of sugar and caffeine overwhelm the benefits of any natural supplements. It's still unknown what the long-term effects of these drinks are, especially if they are mixed with prescription drugs and/or alcohol.

The FDA hasn't conducted significant research on the effects of energy drinks and allows brands to sell them without its approval, but there have been several studies that have tested the ingredients and how they work in the body.

According to The Associated Press, a University of Florida study determined that an energy drink two-thirds the size of a can of Coca-Cola contains two to four times the amount of caffeine. A study at the University of Wisconsin showed that two ingredients, caffeine and taurine, have no effect on short-term memory, but participants reported slower heart rates and increased blood pressure.

Another concern is that energy drinks are consumed much faster than coffee or tea. According to their respective Web sites, eight ounces of Rockstar contain 1,000 milligrams per serving of taurine, a crystalline acid found in bulls, and 80 mg caffeine. Monster has 1,000 mg taurine and 2,500 mg of an "energy blend," which it says is made up of l-camitine, caffeine and guarana, which contains a stimulant. Both Rockstar and Monster offer 8, 16 and 24 ounce beverages. With such high levels of caffeine and sugar, it's easy to think that energy drinks mixed with natural fruit juice can be beneficial. Rockstar Juiced and Monster Khaos are the same formula as standard versions of the brands but claim to mix that with 70-percent juice. The juice reduces some of the bitter taste that come with regular drinks, but whether it adds any nutritional value remains suspect.

"If the juice is natural, it is a good thing," Kelly Stocker, a professor at San Diego State University's department of exercise and nutritional sciences, wrote in an e-mail. "The energy, vitamins, minerals and antioxidants provided certainly do have an added benefit. I do not think it is a good thing if it's just added sugar from sucrose or high fructose corn syrup because that's just extra kilocalories."

Mark Kern, also a professor at SDSU, said it would be better to drink the juice drink because there should be many components remaining from the fruit that aren't present in the original formula, but that doesn't guarantee a healthier beverage.

"When you look at the can, you can see that there are more vitamins in the juiced formula, but that's misleading because you can't tell how much of those vitamins were just added to get the total that is presented," he wrote in an e-mail.

It is likely better for the body to drink the juiced version, though there is no evidence that it provides any additional nutrition. However, people must keep in mind that they are still rapidly ingesting the same amounts of caffeine, sugar and stimulants as they would in a regular energy drink.

So while they are a smoother, better-tasting alternative, juiced energy drinks might be just another way for a $3.4 billion-a-year industry to continue to fuel the "buzzed generation."

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Title: Glut of energy drinks brings fresh warnings

Date: 10/30/2006; **Publication**: The Record (Bergen County, NJ); **Author**: CARLA K. JOHNSON, THE ASSOCIATED PRES

The Record (Bergen County, NJ)

10-30-2006

Glut of energy drinks brings fresh warnings -- Survey finds 31% of American teens use them

By CARLA K. JOHNSON, THE ASSOCIATED PRES

Date: 10-30-2006, Monday

Section: NEWS

Edtion: All Editions

CHICAGO — More than 500 new energy drinks were launched worldwide this year, and coffee fans are probably too old to understand why.

Energy drinks aren't merely popular with young people. They attract fan mail on their own MySpace pages. They spawn urban legends. They get reviewed by bloggers. And they taste like carbonated cough syrup.

Vying for the dollars of teenagers with promises of weight loss, increased endurance and legal highs, the new products join top-sellers Red Bull, Monster and Rockstar to make up a $3.4 billion-a-year industry that grew by 80 percent last year.

Thirty-one percent of U.S. teenagers say they drink energy drinks, according to Simmons Research. That represents 7.6 million teens, a jump of almost 3 million in three years.

Nutritionists warn that the drinks, laden with caffeine and sugar, can hook kids on an unhealthy jolt-and-crash cycle. The caffeine comes from multiple sources, making it hard to tell how much the drinks contain. Some have B vitamins, which when taken in megadoses can cause rapid heartbeat, and numbness and tingling in the hands and feet.

But the biggest worry is how some teens use the drinks. Some report downing several cans in a row to get a buzz, and a new study found a surprising number of poison-center calls from young people getting sick from too much caffeine.

*

"Wow, this drink is some serious stuff. I mean about half the bottle is the warning label, and it is serious, this drink is INSANE. It says that you should not drink it unless you are over 18, which I would say is a good warning." — From a review of an energy drink by Dan Mayer on his Web site, www.bandddesigns.com/energy.

*

Danger only adds to the appeal, said Bryan Greenberg, a marketing consultant and an assistant professor of marketing at Elizabethtown College.

"Young people need to break away from the bonds of adults and what society thinks is right," he said. They've grown up watching their parents drink Starbucks coffee, and want their own version. Heart palpitations aren't likely to scare them off.

Most brands target male teens and 20-somethings. Industry leader Red Bull, the first energy drink on the market, is now the "big arena band" of the bunch "teetering on the edge of becoming too big and too corporate," Greenberg said.

"Monster is more of a hard rocker, maybe with a little punk thrown in, much more hardcore," he said. "Rockstar is the more mainstream, glam rock band that's more about partying then playing."

(Monster is produced by Corona, Calif.-based Hansen Natural Corp., and Rockstar, distributed by Coca-Cola Co., is made by Las Vegas-based Rockstar Inc.)

Greenberg said the fierce competition among hundreds of new drinks, with Austria-based Red Bull guarding the biggest market share, leads to a "ratcheting up" of taboo names as companies try to break out from the crowd.

Cocaine Energy Drink, which launched in September and now sells in convenience stores and nightclubs in six states, is the latest example, following a twisted logic set by drinks named Pimpjuice and Bawls.

Hannah Kirby of the Las Vegas company behind Cocaine Energy Drink said Greenberg has it right. Kirby and her husband, Redux Beverage founder James Kirby, wanted to call their drink by the ho-hum name Reboot. That name was taken, so they decided to get provocative.

They're getting the attention they craved, along with some canceled orders.

Following complaints from parents, convenience store operator 7-Eleven Inc. recently told franchises to pull the drink from its shelves.

"We knew we would get noticed against a thousand other energy drinks," she said. "We knew kids would find it cool, but we also wanted to stress the idea that it's an energy drink, you don't need drugs." Their slogan is "The Legal Alternative."

The Kirbys have an 18-year-old son, Kirby said. The boy grew up hearing he shouldn't drink energy drinks on a school night.

*

"Cocaine looks so freaking tight. I NEED THIS STUFF. Next weekend, me and 3 friends are going to take a 6-hour roadtrip to NYC just to get our hands on this stuff." — From a comment on the MySpace page of Cocaine Energy Drink.

*

Red Bull founder Dietrich Mateschitz based his product on tonics sold in Asia. He started selling Red Bull in 1987 in Austria, his native country, and today 2.5 billion cans are sold a year in more than 130 nations. The industry leader grabbed more than 37 percent of the U.S. market last year, according to Beverage Digest.

Rumors have swirled around Red Bull for years. Contrary to hearsay, the ingredient taurine (an amino acid important in making bile to aid digestion) is not made from bull urine, and Mateschitz did not learn about Red Bull from rickshaw drivers in Thailand. The urban legends-debunking Web site snopes.com has a page devoted to exposing the false claim that Red Bull contains a banned substance linked to brain tumors.

The Swedish government studied energy drinks and recommended they not be used to quench thirst or replenish liquid when exercising. And they should not be mixed with alcohol.

Too late. Anheuser-Busch and Miller Brewing now produce several "energy beers" — beer containing caffeine. And Red Bull and vodka — mixed up by bartenders who call it a Friday Flattener or a Dirty Pompadour — has been popular for a decade. On Red Bull's MySpace page, the product's 11,000 "friends" include alcohol products, which also have their own MySpace pages.

The potential for accidents and alcohol poisoning worries Dr. Sandra Braganza, a pediatrician and nutrition expert at the Children's Hospital at Montefiore in New York. As she prepared to write an article about energy drinks for a pediatrics journal, she was surprised how little published research she could find on them.

"The truth is, we don't know what kind of effects these ingredients can have," Braganza said of taurine, glucuronolactone and guarana. "We have to start doing more studies on this."

Earlier this month, a new study found a surprising number of caffeine overdose reports to a Chicago poison control center. These involved young people taking alertness pills such as NoDoz or energy drinks, sometimes mixed with alcohol or other drugs.

During three years of reports to the center, the researchers found 265 cases of caffeine abuse. Twelve percent of those required a trip to the hospital. The average age of the caffeine user was 21.

Illustrations/Photos: PHOTO - ASSOCIATED PRESS - Dan Mayer of Denver tests energy drinks for his blog. Young people swear by the drinks, but nutritionists worry about caffeine and sugar.

Keywords: BEVERAGE, INDUSTRY

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EXHIBIT 8

BEST RATES. GUARANTEED.
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Portland Press Herald EST. 1862 Maine Sunday Telegram

Energy drinks: Time to kill the buzz?

Worried about caffeine, a legislator proposes a ban on selling energy drinks to those under 18. Teens don't see what the fuss is about.

By JOSIE HUANG, Staff Writer

February 19, 2008

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enlarge

John Ewing/Staff Photographer

Portland High School students, from left, Kali and Abby Daggett and Tess Tacka, all 14, say they are infrequent consumers of energy drinks.

WHAT'S YOUR DAILY JOLT?

7UP: 0 milligrams of caffeine

Decaffeinated coffee, 8 ounces: 2 milligrams

Haagen-Daz Coffee Ice Cream, half cup: 30 milligrams

Diet Coke, 12 ounces: 47 milligrams

Black tea, 8 ounces: 47 milligrams

Green tea, 8 ounces: 30-50 milligrams

Mountain Dew, 12 ounces: 54 milligrams

Espresso, 1 ounce: 64 milligrams

Red Bull, 8.3 ounces: 80 milligrams

Caffeinated coffee, 8 ounces: 95 milligrams

Red Bull touts itself as the energy drink that "gives you wings." Priscilla Dimitre, 17, says she just wants a way to get through work.

Busing tables can get tiring -- 10 miles of walking per shift, Dimitre guesses -- so when she starts to drag her feet, she pops open a slender can of the caffeinated drink.

"All the girls at work drink it," Dimitre said.

If state Rep. Troy Jackson could have it his way, though, the Portland teenager could forget about buying Red Bull until she is 18.

Concerned that energy drinks pack too much of a punch and target young people with names such as "No Fear" and "Rock Star," the Allagash Democrat wants to ban the sale of the most heavily caffeinated of the drinks to minors.

Jackson's bill calls for fining violators $50 for an infraction, $100 for the second time, and $500 for any subsequent offenses.

Sharing Jackson's concerns about energy drinks are public health advocates, who say the sugar content is just as troubling as the caffeine levels, and educators who worry that the drinks overstimulate students and make them act out.

Teenagers, however, who toss back the drinks before study groups, parties and athletic meets, see the restrictions as unnecessary. And industry groups such as the American Beverage Association say it is unfair to focus on energy drinks when most have no more -- or less -- caffeine than a cup of coffee.

A 16-oz. can of Monster Energy, for example, contains 160 milligrams of caffeine, compared to 330 milligrams in a 16-oz. cup of Starbucks coffee.

"There's no scientific basis for this legislation," said Rodney Sacks, chief executive officer of Hansen Beverage Company, which makes Monster. "It's an emotional issue."

Jackson said he is not opposed to caffeine in moderation, but he said some young people are downing the drinks like water, with no clue about how much caffeine they are ingesting. Drink makers are not required to list caffeine quantity on the can, so determining amounts means directly contacting the company.

Store owners in his district have told him that teenagers "come in and buy two, three drinks each, so they could go guzzle them," he said. "They felt it wasn't good for the kids, but they couldn't say 'No, I can't sell it to you.'"

Jackson isn't the first person to go after energy drinks. In Kentucky, a Republican state representative has proposed banning the sale of energy drinks with 71 milligrams of caffeine per 12 oz.

In California, state environmental officials are considering labeling energy drinks as potentially harmful, especially for pregnant women, because of the caffeine content.

France and Denmark already have banned the sale of Red Bull, one of the first energy drinks to arrive on the market and now one of the top-selling in the world.

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Excedrin, extra strength, 2 tablets: 130 milligrams

Full Throttle, 16 ounces: 144 milligrams

Monster Energy, 16 ounces: 160 milligrams

No Fear, 16 ounces: 174 milligrams

NoDoz Maximum Strength, 1 tablet: 200 milligrams

Sources: Pepsi-Cola Co., Mayo Clinic, Red Bull

In the current draft of Jackson's bill, the ban would not cover Red Bull. The bill applies to energy drinks with 80 or more milligrams of caffeine per 8 fluid ounces. Red Bull reports that it has 80 milligrams per 8.3 fluid ounces.

Jackson said he clearly meant to target Red Bull, however, and that the wording will be changed to include the drink when the bill goes before the Health and Human Services Committee this legislative session.

While caffeine has been shown to improve alertness, ingesting too much of the stimulant has the potential among some people to raise levels of anxiety, insomnia, heart rate and blood pressure, researchers have found. Excessive caffeine intake also can lead to dehydration, because it prevents the body from retaining water.

Licensed dietician and competitive runner Anne-Marie Davee stresses in her talks with school adminsitrators and coaches that caffeine is a drug. She is worried that as a result, teenagers will grow addicted to the energy drinks, many of which she said are very sugary.

A 16-oz. can of AMP energy drink, for...

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No more amps: Schools may ban 'energy drinks'

By FRANK SCHULTZ

Saturday, May 24, 2008

Podcast Episode

WCLO's Stan Stricker reports on proposed ban

RSS

JANESVILLE — Some children are turning to energy drinks to start their days, and that's dangerous, Janesville School District officials believe.

The school board on Tuesday will be asked to vote to ban energy drinks in all schools.

Energy drinks combine high doses of caffeine and sugar along with herbs or other substances that are said to boost energy.

Medical authorities are concerned that children's health may be harmed by caffeine, according to a memo presented earlier this month to Superintendent Tom Evert's advisory committee.

While the schools don't sell the drinks, some students carry them to school.

"We are beginning to see our middle school students walking into the schoolhouse with these cans in hand, proudly announcing they are 'amped up,'" according to the memo, written by Marshall Middle School Principal Steve Salerno and Mat Haeger, the district's manager of health services.

The memo continues: "It is believed this has led some students to be exhibiting increasing amounts of loud, unsafe behaviors. Shortly, the 'boost' students receive wears off and they 'crash.' This leaves them lethargic and unable to participate to their fullest ability in the classroom.

"This process repeats itself at lunchtime."

Salerno estimated 10 to 20 students enter Marshall with energy drinks each day. He suspects some buy them at a nearby grocery store on their way to school.

"We see lot of blurting out in class, a lot of kinetic energy being burned up: leg shaking, a lot of tapping, kids not being able to focus on their reading," Salerno said.

In the halls, kids who drink energy drinks can be louder and more boisterous than is normal for middle-schoolers, Salerno said.

When questioned, some students have blamed their behavior on energy drinks, Salerno said.

"We want to be able to take that out of the equation for them, so they can focus on what's important for them right now, which is their studies and being a productive member of our schools," Salerno said.

"Of course, we cannot prevent students from drinking them before school," the memo states. "However, we encourage our parents to look at the research on these items so they can make an informed decision about what's right for their child."

Caffeine is a habit-forming stimulant.

"Medical articles from the United States and Canada indicate that children and pre-teenager children may be more adversely affected by caffeine," according to the memo. "This effect may be related to a child's developing nervous system and the up-and-down hormone levels in pre-teenage children."

There appears to be no proof, however, that moderate caffeine consumption is harmful to children.

The large doses in energy drinks are most concerning, Salerno said.

A 16-ounce energy drink could contain more than three times the amount of caffeine in a 12-ounce caffeinated soft drink or a cup of coffee.

Salerno and Haeger also worry about the high levels of sugar in energy drinks: "This sugar initially provides a boost of energy but two to three hours later can lead to a loss of energy, feeling hungry and unfocused concentration."

The schools already limit the sale of soda pop and other sweetened drinks to after-school hours.

IF YOU GO

What: Janesville School Board meeting where the board will be asked to act on a proposal to ban of energy drinks in schools.

When: 7 p.m. Tuesday.

Where: Educational Services Center, 527 S. Franklin St., Janesville.

Published at: http://www.GazetteXtra.com/news/2008/may/24/no-more-amps-schools-may-ban-energy-drinks/

EXHIBIT 9

CMyGym, LLC v. Engle
D.Utah,2006.
Only the Westlaw citation is currently available.
United States District Court,D. Utah,Northern Division.
MYGYM, LLC, Plaintiff,
v.
Vince ENGLE, Defendant.
Vince Engle, Counterclaimant,
v.
Mygym, LLC, Counterdefendant.
Vince Engle, Third-Party Plaintiff,
v.
Wayne Carlson and Dale Karren, Third-Party Defendants.
No. 1:06-CV-130 TC.

Dec. 6, 2006.

Mark M. Bettilyon, Arthur B. Berger, Ray Quinney & Nebeker, Todd E. Zenger, Nicholas D. Wells, Kirton & McConkie, Salt Lake City, UT, for Plaintiff.
James A. Boevers, James W. McConkie, III, Michael N. Zundel, Prince Yeates & Geldzahler, Salt Lake City, UT, for Defendant.

ORDER AND MEMORANDUM DECISION

TENA CAMPBELL, District Judge.
***1** At the center of this trademark and contract dispute are the MyGym Fitness System (fitness equipment) and the MyGym trademark, the ideas for which originated with Vince Engle.

In 2004, Mr. Engle-along with Wayne Carlson and Dale Karren-formed MyGym LLC to further develop, market, and sell the MyGym Fitness System. But that business relationship, including a License Agreement between Mr. Engle and MyGym LLC, recently disintegrated and the parties have filed competing complaints in this court.

Mr. Engle, as registered owner of the MyGym trademark, has filed a Motion for Preliminary Injunction against MyGym LLC, Wayne Carlson, and Dale Karren, in which he seeks, among other things, an order barring their use of the MyGym trademark, related trade dress, and the MyGym fitness equipment design. Because Mr. Engle has not established irreparable harm, and because the balance of harms weighs in favor of MyGym LLC and its principals, the court finds that Mr. Engle is not entitled to injunctive relief at this time. Accordingly, Mr. Engle's Motion for Preliminary Injunction is DENIED.

BACKGROUND

In April 2004, Vince Engle (who has been involved in the health and fitness industries since 1985) conceptualized a piece of health equipment that would become known as the MyGym Fitness System. In May 2004, he started building prototypes out of wood and PVC pipe in his garage, and during the summer of 2004 he further developed the exercise equipment. He also decided to use the term "MyGym" to name and market the equipment. In September 2004, he presented his ideas and latest prototype to businessmen Wayne Carlson and Dale Karren, both of whom allegedly signed confidentiality agreements.

The three men then agreed to form a company to undertake production and marketing of the equipment. They negotiated the percentage of interest each would receive in the company, with Mr. Engle accepting less than fifty-one percent control of the company in exchange for a smaller stake (he has a twenty-seven percent stake in the company now) and a six percent royalty calculated based on the company's gross sales. In November 2004, they formed MyGym, Inc ., which was then converted to a limited liability company in December 2004.[FN1]

FN1. Eric Stilson also received a small membership interest in the new company and a portion of Engle's royalties in exchange for producing an infomercial to market the MyGym Fitness System on television. Other individuals have since become investors in MyGym LLC.

The License Agreement

On December 1, 2004, Mr. Engle and MyGym LLC executed a License Agreement. The terms of that Agreement acknowledge Engle as the "developer and owner" of the MyGym fitness equipment system, "including, without limitation, all upgrades, future versions, and/or variations thereof," as well as the "MyGym" name, "together with certain other trade names, logos, trademarks and service marks that are not registered or that are pending registration...." (License Agreement Recitals A & B FN2 (Def.'s Ex. E).) MyGym LLC further acknowledged that "the patents, patents pending, and Trademarks delivered to [MyGym LLC] by [Engle] or *which may be acquired by [MyGym LLC] for [Engle] pursuant to the License Agreement or in furtherance of the MyGym Fitness System,* are the *sole and exclusive property of [Engle]....*" (*Id.* ¶ 7.3 (emphasis added).) And MyGym LLC agreed that it would not "contest the sole and exclusive rights of [Engle] to the MyGym Fitness System (patented or unpatented) and Trademarks and other information and intellectual property and items delivered or provided to [MyGym LLC], or *which [MyGym LLC] develops or obtains access to under this License Agreement,* nor shall [MyGym LLC] claim any interest in such property." (*Id.* (emphasis added).) Further, the parties stipulated that

FN2. The License Agreement expressly incorporates the Recitals into the terms of the contract. (Def.'s Ex. E.)

***2** if [MyGym LLC] breaches this Agreement ..., [Engle] shall have *no adequate remedy at law.*Therefore, [MyGym LLC] expressly consents and agrees that [Engle] may, in addition to any other available remedies, obtain an injunction and/or temporary restraining order to terminate or prevent the continuation of any existing default or violation, and to prevent the occurrence of any threatened default or violation by Licensee of this License Agreement, and that such injunction or order may be issued without the necessity of posting bond.
(*Id.* ¶ 13 (emphasis added).)

During negotiations concerning company formation and the License Agreement, Mr. Engle made certain representations regarding the status of the MyGym mark. Mr. Engle testified during the evidentiary hearing that he told Mr. Carlson and Mr. Karren that his brother had abandoned the name MyGym (in 2000, his brother had filed, and later abandoned, an *application* to register the "MyGym" mark with the United States Patent and Trademark Office for use in promoting a chain of health and fitness clubs) FN3 and that he had permission from his brother to use the MyGym name for the newly developed equipment and proposed business venture.

FN3.*See* Pls.' Ex. 1; Def.'s Ex. S.

Testimony from Mr. Carlson, Mr. Karren, and Mr. Engle's former attorney David Hirschi (who drafted the License Agreement) suggests that Mr. Engle represented that he had some federally registered rights in the word "MyGym." Moreover, in the Agreement itself, Recitals A and B provide that Engle is "developer and owner of MyGym® (Patent Pending) fitness equipment" and that the "MyGym Fitness equipment system has been registered with the appropriate agencies of the state of Utah and with the United States Patent and Trademark Office."

The written recitals were not accurate because "MyGym" was not a registered trademark at the time the License Agreement was signed, and there was no patent application pending. Indeed, Mr. Engle did not submit a patent application to the United States Patent and Trademark Office until December 10, 2004 (*see* Pls.' Ex. 9), and he did not file an "intent to use" application to obtain a registered trademark until January 3, 2005. (*See* Pls.' Ex. 2.)

The parties dispute whether the representations were material to formation and performance of the License Agreement.

Amendment to the License Agreement

The parties amended the License Agreement on February 1, 2005, to add the condition that,

should [MyGym LLC] dissolve for any reason, and the result of that dissolution be that [Engle] regains control of all rights to the MyGym Fitness System, free and clear of the License, [Engle] agrees that any income derived through the sale or re-licensing of the MyGym Fitness System shall be *paid to the original Unit holders of [MyGym LLC] (including [Engle])*

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on a pro-rata basis up to the amount of their original investment....

(First Amendment to License Agreement ¶ 10.8 (emphasis added) (Def.'s Ex. E).) No other relevant portions of the License Agreement were modified, and the First Amendment expressly stated that, "[e]xcept as modified hereby, the terms and conditions of the Agreement remain in full force and effect between the parties as of the date of this First Amendment."*(Id.)*

Patent Application

***3** As noted above, the first patent application was filed on December 10, 2004-ten days after the License Agreement was executed. Also, according to Mr. Carlson, after the License Agreement was executed, numerous alterations to the exercise device were required to make it commercially and economically feasible. The vast majority of these changes, MyGym LLC says, were made by Mr. Carlson and financed by MyGym LLC. *(See* Decl. of Wayne Carlson ¶ 2; Pls.' Mem. Opp'n to Mot. for Prelim. Inj. at 12.) According to Mr. Engle, he, with the assistance of MyGym LLC employees (principally Mr. Carlson), continued to develop and redefine his concept, with the core concept remaining the same. (Second Decl. of Vince K. Engle ¶ 18.) And he allowed the modification in reliance on Paragraph 7.3 of the License Agreement providing that anything developed by MyGym LLC would remain his intellectual property. (*Id*.)

On December 2, 2005, MyGym LLC's and Mr. Engle's attorney at Kirton & McConkie filed another patent application naming Mr. Engle as the sole inventor. But on July 31, 2006, Kirton & McConkie informed Mr. Engle that, based on information provided by Mr. Carlson, it had just filed an amendment to the patent application to list Wayne Carlson as an inventor. The July 31, 2006 letter questioned Mr. Engle's claim of exclusive ownership of the intellectual property rights. (Def.'s Ex. O.) Mr. Engle contends that this act is a violation of MyGym LLC's obligation under the License Agreement to refrain from challenging Mr. Engle's rights to the MyGym fitness equipment.

Trademark Application and Registration

On May 9, 2005, Mr. Engle submitted another "intent to use" trademark application. *(See* Def.'s Ex. T.) Although the trademark application was submitted in Mr. Engle's name, it was filed with the knowledge and cooperation of MyGym LLC and its principals, Mr. Carlson and Mr. Karren, all of whom retained the law firm Kirton & McConkie to obtain the registered trademark in Mr. Engle's name. Furthermore, the use of the mark in commerce, a necessary prerequisite, appears to have been accomplished through Mr. Engle's related company or licensee, MyGym LLC. The United States Patent and Trademark Office issued a registered trademark to Mr. Engle on October 10, 2006. *(See id.;*Def.'s Ex. H.)

Initial Marketing and Distribution

MyGym LLC began marketing and selling the equipment in March 2005. The company's efforts included (a) the production and nationwide placement of print advertising; (b) the production, testing and placement of the infomercial developed by Eric Stilson; (c) and work by Mr. Engle and other MyGym LLC principals and employees at trade shows and expositions.

Trademark Infringement Claim by California Company

On June 13, 2005, Mr. Engle received a letter from an attorney representing an entity called Gym Consulting, Inc. which had federally registered rights in the trademark "My Gym." The letter asked Mr. Engle to cease all use of the MyGym mark and the domain name *www.mygym.net.* The company also threatened to file opposition proceedings in the Trademark Office against the pending "MyGym" trademark applications. *(See* Pls.' Ex. 7.)

***4** After settlement negotiations between Gym Consulting on the one hand and MyGym LLC and Mr. Engle on the other hand, the parties entered into a Settlement Agreement, dated March 1, 2006. As a result of the Settlement Agreement, MyGym LLC and Mr. Engle are required to limit their use of the MyGym mark (for example, they may not market clothing using the MyGym mark), they must pay money to Gym Consulting, and MyGym LLC must change its name. *(See* Pls.' Ex. 14.) MyGym LLC and Mr. Engle, both of whom were parties to the Settlement Agreement, are still negotiating how they

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will divide up their financial obligations to Gym Consulting.

Bay Street Brands LLC as Exclusive Distributor

On January 12, 2006, MyGym LLC entered into an exclusive Distribution Agreement with Bay Street Brands LLC. (Def.'s Ex. J.) The Distribution Agreement grants Bay Street the exclusive right to sell and distribute MyGym products in the United States. In order to retain its sole distribution rights, Bay Street must sell 80,000 MyGym units in the first twelve months of the Distribution Agreement and 240,000 units in the second year of the Agreement. To date, Bay Street has sold approximately 15,000 units.

MyGym LLC is to receive "commissions" and "royalties" from these sales. Although it is entitled to keep the "commissions" as revenue, under ¶ 7.1 of the Distribution Agreement the "royalties" (separately defined and calculated as 6% of Gross Revenues) were to be paid to MyGym LLC "to permit MyGym to fulfill its contractual obligations to pay royalties to the original inventors or developers of the Products and producer of the infomercial."That is, apparently MyGym LLC was to pass the "royalties" along to Mr. Engle to satisfy its initial obligations under the License Agreement.

According to Bay Street representative Denise Kovac (who testified at the evidentiary hearing), Bay Street is confused as to who (between Mr. Engle and MyGym LLC) owns the rights to the MyGym mark and fitness equipment. She testified that Bay Street, at the request of its shareholders, has stopped marketing and selling MyGym products so as to avoid being pulled into the legal dispute. She further testified that the legal dispute between Mr. Engle and MyGym LLC has interfered with Bay Street's ability to obtain necessary financing and re-negotiate the Distribution Agreement, which Bay Street believes is contrary to the realities of the marketplace. Finally, she testified that she would not be able to calculate lost business opportunities if Bay Street is not able to continue marketing the MyGym fitness system.

Non-Payment of Royalties and Termination of the License Agreement

During the time the parties were applying for various intellectual property protections, dealing with Gym Consulting's trademark infringement claim, and establishing an exclusive distribution agreement with Bay Street, a dispute about payment of royalties arose.

Under the License Agreement, Mr. Engle was to receive his first royalty payment on May 1, 2005, and his second on July 1, 2005. But these payments were not made. On August 11, 2005, Mr. Engle sent MyGym LLC a Notice of Default and Demand for Payment, as required by Paragraph 10.3(b) of the License Agreement. (Second Decl. of Vince Engle ¶ 26.) MyGym LLC did not pay because it did not have the ability to pay.

***5** On August 23, 2005, Mr. Engle resigned as a manager of MyGym LLC. But he agreed to forebear payment of royalties due him under the License Agreement either until Mr. Carlson or Mr. Karren began to receive money from the company, or by June 1, 2006, whichever occurred first. Apparently, the provision in the Bay Street Distribution Agreement regarding payment of "royalties" was a vehicle created by Mr. Engle and MyGym LLC to assure payment of the past-due royalties.[FN4]

FN4. Nothing in the record reflects a complaint about the purported lack of value of the intellectual property Mr. Engle brought to the License Agreement. Indeed, the record contains two unsigned documents apparently drafted in 2005 that suggest the parties were attempting to re-negotiate their License Agreement in light of market realities, not in light of the value of the property licensed in December 2004. Those two documents are the unsigned Memorandum of Understanding (Def.'s Ex. W) and the unsigned Amended and Restated License Agreement (Def.'s Ex. U).

The Amended and Restated License Agreement (albeit unsigned) retains the language in Recitals A and B that MyGym LLC now claims was a material misrepresentation. It also contains language that the amended agreement supercedes the December 1, 2004 License Agreement and relates back to the December 1, 2004 date. "All acts of the

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> parties with respect to this Agreement between December 1, 2004, and the date set forth above are hereby acknowledged, agreed to, ratified, and confirmed."(Def.'s Ex. U at 2.) It acknowledges that "Trademarks" (defined in the Agreement) are "pending." *(Id.* at ¶ 9(a).)
>
> In the unsigned Memorandum of Understanding, the language provides that "MyGym and Engle recognize and acknowledge that the License Agreement as drafted and executed by the parties did not take into account certain realities of commencing the marketing of the MyGym Fitness system and other aspects of the business relationship created by the License Agreement and Engle's investment in MyGym, LLC." (Unsigned 2005 Memorandum of Understanding between Engle and MyGym (Def.'s Ex. W), Recital B.) The record does not clarify what the parties meant by "other aspects of the business relationship" and "Engle's investment in MyGym, LLC."

On July 26, 2006, in light of MyGym's failure to pay royalties, Mr. Engle again gave written notice of default as required under the License Agreement. In his notice letter, Mr. Engle told MyGym LLC that

[t]he continual lack of communication, no reporting, no payments and a disregard for the value which I have contributed [as] represented by the License Agreement has now moved me to a position to look at *changing the status of the asset where the asset is more liquid and I have control over that liquidity....* I contacted Mark Baker [at Bay Street] and have expressed my interest in selling the patents and rights associated. This letter will also serve as my notice to you that *I intend to sell the patents and rights.*If Mark [Baker] is not interested or if we can't find a reasonable value then I will start searching for an appropriate qualified buyer.... Again, please do not interpret this letter as my lack of appreciation of what you are doing and have done, but as a resolve to get the past current and to move forward slowly. *I have demands in my life now that insist that I consider selling the patents, this is from outside obligations that I am pressured to resolve and that I have held off as long as possible.*

(Def.'s Ex. M (emphasis added).) On October 5, 2006, Mr. Engle terminated the License Agreement according to the requirements in ¶ 10.3 ("Termination Upon Notice") of the License Agreement.

The Lawsuit and Request for Preliminary Injunctive Relief

Immediately after Mr. Engle submitted his termination notice, MyGym LLC filed the current lawsuit against Mr. Engle and told him in an October 11, 2006 letter that he was in breach of the License Agreement and could not unilaterally change his alleged oral agreement to further defer payment of royalties. (Def.'s Ex. Q.) MyGym LLC's Complaint asserts causes of action for unfair competition, deceptive trade practices, breach of contract, breach of fiduciary duty, and interference with contractual and expected business relationships.

On October 30, 2006, Mr. Engle filed counterclaims, third-party claims and his Motion for Preliminary Injunction. He asserts causes of action for breach of the License Agreement, breach of confidentiality agreements, trademark and trade dress infringement, unfair competition, and tortious interference with prospective business relations. He asks the court to enjoin MyGym LLC, Mr. Carlson and Mr. Karren from:

(1) infringing upon, marketing, disseminating, and/or selling the MyGym Fitness System, the MyGym tradename and mark, related trade dress and any other trade secrets and confidential information or materials associated therewith;

***6** (2) withholding from or failing to return to Engle any and all MyGym related materials and equipment in its possession;

(3) withholding from or failing to account for and pay to Engle royalties owing for past use of the MyGym Fitness System and Trademarks;

(4) competing with Engle in violation of the Covenant Not to Compete described in ¶ 11 of the License Agreement executed by and between Engle and MyGym; and

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(5) disseminating or otherwise revealing confidential information in violation of the Confidentiality Agreements executed by and between Engle and Carlson and Karren and the confidentiality clause found at ¶ 7.2 of the License Agreement.

(Engle's Mem. Supp. Mot. Prelim. Inj. at 2.)

ANALYSIS

"A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule."GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir.1984). The burden is "especially heavy" when "the relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after a trial on the merits."*Id.* at 679.

To obtain preliminary injunctive relief, Mr. Engle must establish that (1) there is a substantial likelihood of success on the merits of his claims; (2) he will suffer irreparable injury unless the court issues the injunction; (3) the threatened injury to Mr. Engle outweighs damage the proposed injunction would cause MyGym LLC, Mr. Carlson, and Mr. Karren; and (4) the injunction, if issued, would not be adverse to the public interest. *Schrier v. University of Colo.,* 427 F.3d 1253, 1258 (10th Cir.2005); *see also* 15 U.S.C. § 1116(a) (providing district courts with jurisdiction and authority to grant injunctions "*according to the principles of equity* and upon such terms as the court may deem reasonable, to prevent violation of the right of the registrant of a mark" under 15 U.S.C. § 1125(a)) (emphasis added). Moreover, because Mr. Engle seeks a disfavored injunction,FN5 his motion " 'must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course .' " *Id.* at 1259 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir.2004) (en banc)). Mr. Engle must "make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on [the Tenth Circuit's] modified likelihood-of-success-onthe-merits standard." *O Centro,* 389 F.3d at 976.

FN5. The Tenth Circuit has identified three historically disfavored preliminary injunctions: (1) those that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that give the movant all relief it could obtain after a trial on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir.2004) (en banc). Mr. Engle seeks a mandatory preliminary injunction, which is the type of injunction that " 'affirmatively require[s] the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.' " *Schrier,* 427 F.3d at 1261 (quoting *SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1099 (10th Cir.1991)).

Although Mr. Engle alleges numerous causes of action in his counterclaim and third-party complaint, he seeks preliminary injunctive relief only on his claim for breach of the License Agreement and his claims for trademark infringement and unfair competition.

1. *Likelihood of Success on the Merits*

a. *Breach of the License Agreement*

Principally, Mr. Engle contends that MyGym LLC has breached the License Agreement by failing to pay him royalties and by contesting Mr. Engle's ownership of intellectual property rights to the MyGym trademark, trade dress, and fitness equipment.FN6Mr. Engle also points to Paragraph 13 of the License Agreement, in which MyGym LLC acknowledged that a breach would leave Mr. Engle with "no remedy at law" and that Mr. Engle is entitled to injunctive relief.

FN6. Mr. Engle also contends that Mr. Carlson and Mr. Karren have breached Confidentiality Agreements. Assuming such agreements were properly executed (for example, Mr. Carlson disputes even signing such an agreement), the record contains no evidence that any confidential information has been disclosed. Accordingly, the court does not find Mr. Engle's claims of breach of the confidentiality agreements persuasive

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and it will not consider them in the analysis.

*7 MyGym LLC counters that Mr. Engle materially breached the License Agreement when it was executed, because, contrary to his representations, he did not have rights to the "MyGym" mark or rights in a pending patent application on the effective date of the License Agreement. Consequently, according to MyGym LLC, Mr. Engle does not have the right to enforce against an alleged subsequent breach by MyGym LLC.

"The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party. Also, a party seeking to enforce a contract must prove performance of its own obligations under the contract."*Eggett v. Wasatch Energy Corp.,* 94 P.3d 193, 199 (Utah 2004) (quoting *Holbrook v. Master Prot. Corp.,* 883 P.2d 295, 301 (Utah Ct.App.1994)).*See also* *Aquagen Int'l, Inc. v. Calrae Trust,* 972 P.2d 411, 414 (Utah 1998) ("performance cannot be compelled when the non-failing party to a contract fails to receive that which has been bargained for"). The question of whether a breach is material is one of fact. *Coalville City v. Lundgren,* 930 P.2d 1206, 1209 (Utah Ct.App.1997).

There is no question that, at the time the License Agreement was executed, Mr. Engle did not own the rights described in the License Agreement and so he misrepresented the value of what he brought to the bargaining table. But it appears that none of the parties truly understood the legal implications of the terms, and, further, Mr. Carlson and Mr. Karren did expect that some future applications would be necessary. Indeed, Mr. Carlson's and Mr. Karren's expectations are demonstrated by the parties' actions (and inactions) after the License Agreement was executed.

First, when the parties to the License Agreement amended it on February 1, 2005, they did not change any of the recitals containing the misrepresentations which they now claim to be material. In fact, they specifically re-iterated the un-amended portions of the License Agreement, including Recitals A and B (which contained the misrepresentations).

Second, when Mr. Engle sent his May 2005 "intent to use" trademark registration application to the United States Patent and Trademark Office, he did so with the full knowledge and cooperation of MyGym LLC, who along with Mr. Engle retained the attorney to file the application. Moreover, that application lists Vince Engle as the owner.

Third, after MyGym LLC received notice from Gym Consulting, Inc. in June 2005 about a possible infringement lawsuit, MyGym LLC did not attempt to void the License Agreement based on a purported lack of value of what Mr. Engle provided at the company's inception.[FN7]The same can be said about Mr. Engle's August 2005 letter demanding payment of royalties.

FN7. Even after the parties settled with Gym Consulting, Inc. on March 1, 2006, no inkling of MyGym LLC's claim of failure of consideration arose until July 2006, in the letter from Kirton & McConkie to Mr. Engle. (*See* July 31, 2006 Letter from David Tingey, Esq. of Kirton & McConkie, to MyGym LLC and its principals (Def.'s Ex. O).)

Fourth, the stated reason that MyGym LLC did not pay the royalties to Mr. Engle was that they did not have the money to pay. No mention was made, until litigation was on the horizon in the summer and fall of 2006, of the value of the intellectual property licensed by Mr. Engle in December 2004.

*8 Fifth, in August 2005, Mr. Carlson wrote a letter to Mr. Engle detailing Mr. Carlson's specific concerns about his and MyGym LLC's relationship with Mr. Engle. (*See* Aug. 24, 2005 Letter from Wayne Carlson to Vince Engle (Def.'s Ex. V).) Nowhere in the letter does he raise an issue regarding representations made when the License Agreement was executed on December 1, 2004, much less the materiality of such representations.

For all of these reasons, the court finds, at this preliminary stage, that Mr. Engle did not materially breach the License Agreement in the manner asserted by MyGym LLC. Accordingly, he may follow through on his breach of contract claim.

It appears from the record that MyGym LLC has not satisfied its obligations to pay royalties to Mr. Engle. Further, there is no question that MyGym LLC is now contesting Mr. Engle's intellectual property

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rights in apparent disregard of language in ¶ 7.3 of the License Agreement. Finally, regardless of the efforts (financial or otherwise) made by other principals at MyGym LLC, the language of the License Agreement contemplates that Mr. Engle alone reaps the benefit of those efforts when it comes to ownership of the MyGym intellectual property rights.

At this preliminary stage, Mr. Engle has established a likelihood of success on his claim for breach of the License Agreement.

b. *Trademark Infringement and Unfair Competition*

To establish likelihood of success on the merits of his trademark and unfair competition claims, Mr. Engle must establish that the mark is valid and legally protected, that he owns it, that MyGym LLC has used the trademark in commerce without his permission, and that there is likelihood of confusion as to the source of the MyGym fitness equipment. 15 U.S.C. §§ 1114, 1125(a); *Universal Money Ctrs., Inc. v. AT & T Co.,* 22 F.3d 1527, 1529 (10th Cir.1994).

There is no dispute that the mark is federally registered in Mr. Engle's name, and that MyGym LLC has used (or intends to use) the mark even after Mr. Engle's termination of the License Agreement. Still, even though the mark is registered (as of October 10, 2006), MyGym LLC has possible defenses under 15 U.S.C. § 1115(b).*See also GTE Corp.,* 904 F.3d at 540 n. 3 (citing 15 U.S.C. § 1065, the court stated that, with some exceptions, "a mark becomes incontestable if continuously used for five consecutive years after registration, provided it does not infringe valid rights acquired by common law usage before the date of publication of the registered mark."). It is not clear whether MyGym LLC has raised (or is going to raise) specific defenses under this statutory provision,[FN8] but certainly MyGym has raised questions about Mr. Engle's ownership of the mark under the Lanham Act. Also, certain issues arise regarding the"likelihood of confusion" element.

FN8. MyGym LLC, Mr. Carlson, and Mr. Karren have not yet answered Mr. Engle's Counterclaim and Third-Party Complaint.

"The key to proving trademark infringement is showing a likelihood of confusion as to the source of the product or service."*GTE Corp. v. Williams,* 731 F.2d 676, 678 (10th Cir.1984) (citing 15 U.S.C. § 1114); *see also King of the Mountain Sports, Inc. v. Chrysler Corp.,* 185 F.3d 1084, 1089 (10th Cir.1999) ("Likelihood of confusion forms the gravamen for a trademark infringement action.") (citing 15 U.S.C. §§ 1114, 1125). The same can be said for Mr. Engle's claims of trade dress infringement and unfair competition under the Lanham Act. *See id.;*15 U.S.C. §§ 1114, 1125(a) (containing requirements of likelihood of confusion).*See also Amoco Oil, Co. v. Rainbow Snow,* 748 F.2d 556, 558 (10th Cir.1984) (holding that determinations of liability in trademark, trade dress, and unfair competition under Utah law are made according to standards set forth in Lanham Act).[FN9]

FN9. If Mr. Engle's state law claims require analysis of a different set of elements, the parties have not briefed the issue (they focus solely on federal trademark law) and so the court will not consider it here.

***9** Mr. Engle notes that the Tenth Circuit has identified six factors, derived from the Restatement of Torts § 729, that aid in determining whether a likelihood of confusion exists (which is a question of fact). Those factors are (1) the degree of similarity between the marks; (2) the intent of the alleged infringer in adopting its mark; (3) evidence of actual confusion; (4) the relation in use and the manner in marketing between the goods or services marketed by the competing parties; (5) the degree of care likely to be exercised by purchasers; and (6) the strength or weakness of the marks. *King of the Mountain,* 185 F.3d at 1089-90. This list is not exhaustive, the factors are "interrelated," and "no one factor is dispositive." *Id.* But the factual situation in *King of the Mountain* is different, so its factor-by-factor analysis is not easily transferred to the MyGym case. For instance, the court in *King of the Mountain* was evaluating two competing marks, not the same mark. Moreover, it was assessing the response that a consumer would have at the point of advertising to the allegedly similar marks. So, rather than apply the factors individually, Mr. Engle claims likelihood of confusion in two circumstances.

First, he cites to actual confusion on the part of Bay Street. But Bay Street is not confused about the source of the product or service. Rather, Bay Street is

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concerned (for practical business reasons) about who is legally entitled to control the MyGym brand. Moreover, Bay Street is not a consumer of the MyGym fitness equipment in the manner contemplated by the trademark infringement law. *See, e.g.,* Continental Plastic Containers v. Owens Brockway Plastic Products, Inc., 141 F.3d 1073, 1080-81 (Fed.Cir.1998) (noting that, to determine likelihood of confusion, court must identify the relevant consumer base, and that inquiry centers on "confusion of consumers in the market for the particular product at issue"). Here there is no evidence that a person buying the MyGym Fitness System through direct marketing or through a retailer like Wal-Mart would be concerned with, much less confused by, the question of whether the source of the product is Vince Engle or MyGym LLC.

Second, Mr. Engle contends that use of the exact same mark in the same market is a conclusive factor in finding likelihood of confusion. *See, e.g.,* S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 375 (3d Cir.1992) ("concurrent use [of exact same trademark] is highly likely to cause consumer confusion about [the franchisee's] affiliation with the franchise"); Burger King Corp. v. Mason, 710 F.2d 1480, 1492 (11th Cir.1983) ("Common sense compels the conclusion that a strong risk of consumer confusion arises when a terminated franchisee continues to use the former franchisor's trademark's."). But this case is different. Mr. Engle and MyGym LLC are not competing. They are not operating businesses simultaneously. Rather, Mr. Engle wants to substitute himself for MyGym LLC in the market. Right now, there is no situation that would cause the confusion identified in the above-cited cases because there is no competition to be confused about. This case is not as simple as Mr. Engle suggests. Mr. Engle was intimately involved in the formation of MyGym LLC. He was involved in many decisions that not only created income for the company but also created financial obligations. He is not so easily separated from the entity. In other words, his relationship with MyGym LLC, Mr. Carlson, and Mr. Karren is much more involved than the cases of, for example, a franchisor and franchisee, or a straightforward licensor/licensee relationship. For these reasons, it is not clear to the court that a likelihood of consumer confusion is imminent.

***10** Still, even if Mr. Engle were to establish a clear likelihood of success on the merits of his trademark and unfair competition claims, he cannot establish irreparable harm.

2. *Irreparable Harm*

Harm is irreparable when it cannot be measured and is not compensable with monetary damages. *Dominion Video Satellite, Inc. v. Echostar Satellite Corporation,* 356 F.3d 1263 (10th Cir.2004) (irreparable harm determinations consider factors such as "inability to calculate damages, harm to goodwill, diminishment of competitive positions in marketplace ... and lost opportunities to distribute unique products"). The injury must be "certain, great, actual and not theoretical."*Schrier,* 427 F.3d at 1267 (internal citations omitted); *see also Dominion Video,* 356 F.3d at 1262 (irreparable injury "must be both certain and great, and ... must not be merely serious or substantial").

a. *Breach of License Agreement Claim*

Mr. Engle points to language in the License Agreement in which the parties stipulated that

if [MyGym LLC] breaches this Agreement ..., [Engle] shall have *no adequate remedy at law.*Therefore, [MyGym LLC] expressly consents and agrees that [Engle] may, in addition to any other available remedies, obtain an *injunction* and/or temporary restraining order to terminate or prevent the continuation of any existing default or violation, and to prevent the occurrence of any threatened default or violation by Licensee of this License Agreement, and that such injunction or order may be issued without the necessity of posting bond.

(*Id.* ¶ 13 (emphasis added).) Such a provision does not settle the question of irreparable harm.

In *Dominion Video Satellite, Inc. v. Echostar Satellite Corporation,* 356 F.3d 1256 (10th Cir.2004), the Tenth Circuit addressed a situation in which the agreement at issue contained a similar provision. In that case, "[t]he Agreement state[d] that should either party breach the agreement, money damages would be insufficient, the harm from the breach would be irreparable, and the non-breaching party would have the right to obtain specific performance or injunctive

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relief."*Id.* at 1259 (summarizing language of contract). But based on the specific circumstances of the case, the Tenth Circuit found that no irreparable harm had been established. The court noted that:

[w]hile courts have given weight to parties' contractual statements regarding the nature of harm and attendant remedies that will arise as a result of a breach of a contract, they nonetheless characteristically hold that such statements alone are insufficient to support a finding of irreparable harm and an award of injunctive relief.... Instead, the courts also identify other factors which establish that the harm is indeed irreparable.

Id. at 1266 (internal citations omitted). Clearly, the parties' stipulation in *Dominion Video* carried little, if any, weight in the Tenth Circuit's analysis of whether irreparable harm existed.

***11** In the case here, the parties' stipulation also does not carry much weight, because the economic damages can be measured (indeed, Bay Street's representative noted that sales could be easily accounted for if only Bay Street knew which of the two parties it should deal with). Any profits from sales that MyGym LLC makes can be fully accounted for, as can overdue royalty payments. As for injury caused by MyGym LLC's challenge to Mr. Engle's intellectual property rights, any purported irreparable harm is inextricably intertwined with irreparable harm under the trademark and unfair competition claims, and that issue is addressed below.

In short, on the basis of Mr. Engle's contract claim alone, the court finds that he has not established irreparable harm.

b. *Trademark Infringement and Unfair Competition Claims*

Typically, a finding of infringement creates a presumption of irreparable harm. *E.g.,* GTE Corp., 731 F.2d at 678. But that presumption is not a given. "Despite the general acknowledgment that irreparable harm often arises from the breach of [exclusive licensing agreements], courts do not automatically, nor as a matter of course, reach this conclusion. Rather, they examine whether the harms alleged by the party seeking the preliminary injunction are in fact irreparable, and sometimes conclude in the negative."*Dominion Video Satellite,* 356 F.3d at 1260. *See also* *Ebay Inc. v. Mercexchange, L.L.C.,* 126 S.Ct. 1837 (May 15, 2006) (holding that injunctions under patent law should not be automatically granted upon finding of infringement, that the presumption of injury should not result in categorical grant of relief, and that courts must exercise discretion under traditional principles of equity). Right to relief, especially in the context of a request for disfavored injunctive relief, must be "clear and unequivocal." *Dominion Video Satellite,* 356 F.3d at 1261 (quoting *SCFC ILC, Inc. v. Visa USA, Inc.,* 936 F.2d 1096, 1098 (10th Cir.1991)). In this case, considering all of the circumstances (including the parties' business venture relationship and their pre-litigation focus on quantifiable financial injuries) and given the high standards that apply here, the court finds that Mr. Engle has not satisfied his burden to establish irreparable harm.

The court finds the case of *Dialogo, LLC v. Santiago-Bauza,* 425 F.3d 1 (1st Cir.2005), to be very persuasive. In *Dialogo,* the First Circuit denied a motion for preliminary injunction in a trademark infringement case filed under the Lanham Act. The court described the situation as "an ill-fated business arrangement" between an entity (DMSA) and an individual (Lillian Santiago) who together formed Dialogo, LLC to publish a bilingual newspaper (El Dialogo) in Massachusetts. DMSA provided the initial capital. Ms. Santiago brought the publication (which she had been operating at a loss) to the venture. Approximately eight months after the parties formed their business venture, Ms. Santiago told DMSA that she was closing the business. But she continued to publish El Dialogo through her new entity, El Dialogo LLC. DMSA sued, alleging claims for trademark infringement, misappropriation of trade secrets, and breach of contract. DMSA also sought a preliminary injunction preventing Ms. Santiago from using the title "El Dialogo," disclosing proprietary information, and using the physical assets of Dialogo, LLC. The First Circuit found no irreparable harm, even for the trademark infringement claims:

***12** Although there is law to the effect that irreparable injury is presumed in infringement cases where the plaintiff shows a likelihood of success [citation omitted], this case does not fit the mold. Irreparable-or at least unquantifiable-injury may be fairly likely where two business are vying for the same customers using the same trademark or two marks that can be confused with one another. There, every customer diverted to a defendant may be an undetectable loss, even a permanent one, to the plaintiff. Thus, a presumption of irreparable injury makes some sense.

This case is quite different. Here, from DMSA's own version of the events, Santiago is conducting the Dialogo, LLC business under her new company's name and DMSA is publishing no similar newspaper. DMSA does not claim that Santiago is running the business into the ground; the question is whether a share of profits (if any), and ultimately the business itself, should be restored to Dialogo, LLC. The kind of irreparable injury that ordinarily underpins the presumption is not present here; for all we can tell, everyone will be better off with a continuation of the business by Santiago for the time being and a swift trial.

Dialogo, LLC v. Santiago-Bauza, 425 F.3d 1, 4 (1st Cir.2005).*See also Kitty Walk Sys., Inc. v. Midnight Pass Inc.,* 431 F.Supp.2d 306, 309 (E.D.N.Y.2006) (noting that district court denied preliminary injunctive relief to owners of trademark and patent rights who sued business partner after business venture deteriorated, because defendants distributed authentic products about which there was no confusion).

The case here also "does not fit the mold" of a typical trademark infringement or licensing dispute. Mr. Engle relies on the presumption of irreparable harm, FN10 but the presumption is not properly invoked here for essentially the same reasons articulated in *Dialogo.*And he has no evidence to back up his conclusory statements that he will suffer the loss of goodwill, injury to his reputation, loss of trade, and dilution of the MyGym mark. For these reasons, the court finds that Mr. Engle has not established that he will suffer irreparable injury if an injunction is not granted.

FN10. Mr. Engle also relies heavily on the unreported case of *Tsunami Softgoods, Inc. v. Tsunami Int'l, Inc.,* Case No. 2:00CV738K (D.Utah Jan. 19, 2001), to support his position. *Tsunami* is distinguishable because there the court was not faced with the complications of estranged business venture partners and a contestable trademark.

3. *Balance of the Harms and Public Interest*

Regardless of how the court rules, both parties will suffer harm. Granting an injunction would prevent MyGym LLC from using its only valuable assets. It is possible that MyGym LLC would go out of business in the interim (its only source of income would be denied), and a substantial amount of money (and labor) would be lost by investors. Moreover, Bay Street (MyGym LLC's exclusive distributor) will remain in limbo. On the other hand, denying an injunction will prevent the registered owner of the trademark from controlling his intellectual property in the interim and will delay direct financial benefit from the sale of that property until after a decision on the merits has been issued (assuming he succeeds on his claims).

***13** The public has an interest in preventing both types of harms. So the "public interest" factor does not weight in favor of either side.

But the balance of harms weighs in favor of MyGym LLC. There is evidence in the record that MyGym LLC and its principals, including not only Mr. Engle but Mr. Carlson and Mr. Karren, provided much labor and capital to develop value in MyGym LLC, particularly the MyGym mark, related trade dress, and potential patent rights. MyGym LLC's sole purpose is to further develop, market, and sell the MyGym products. If Mr. Engle obtains the injunctive relief he requests, he will essentially be getting everything he requests in his complaint but without a full trial on the merits. And MyGym LLC (and Mr. Carlson and Mr. Karren) will be left with little, if anything (the court does not agree that this is a case of self-inflicted harm, as was alleged in *Tsunami).* This is particularly problematic because MyGym LLC has not had a full opportunity to present its defenses to Mr. Engle's trademark infringement and unfair competition claims. For these reasons, the court finds that Mr. Engle has not established that the balance of harms weighs in favor of granting injunctive relief.

CONCLUSION

Mr. Engle has failed to meet the heavy burden

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applicable to preliminary injunctive relief.

While Mr. Engle may ultimately prevail on some, or perhaps even all, of his claims, he has not established irreparable harm. Further, consideration of the balance of the parties' potential harms supports the conclusion that a preliminary injunction is inappropriate in this case.

ORDER

For the foregoing reasons, Mr. Engle's Motion for Preliminary Injunction is DENIED, and Mr. Engle's Motion to Strike Portions of Declaration of Dale Karren is DENIED AS MOOT.

D.Utah,2006.
MyGym, LLC v. Engle
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EXHIBIT 10

5-hour ENERGY

Hours of energy now • No crash later*
Zero sugar • Only 4 calories

NEW Decaf!

Buy Online or In Store ▸

ENERGY DRINK COMPARISON

Ingredients

Compare 5-Hour Energy with a popular canned energy drink. You'll see that 5-Hour Energy contains more of what you want and less of what you don't want in an energy drink.

	5-Hour Energy as of October 2007	Popular Canned Energy Drink
Serving Size	2oz	8oz
Calories	4	100
Sugar	0	27g
Carbohydrates	0	27g
Sodium	10mg	180mg
Niacin (Vitamin B3)	30mg	20mg
Vitamin B6	40mg	2mg
Vitamin B12	500mcg	6mcg
Energy Blend	1870mg	1250mg*
Herbal Stimulants	No	Yes

* Lists sugars as part of the energy blend. 5-Hour Energy contains zero sugar.

5-hour ENERGY
VS.
POPULAR CANNED ENERGY DRINK

Convenience

When it comes to convenience, 5-Hour Energy has it all over canned energy drinks. While they go bigger and bigger - as much as 24 ounces - 5-Hour Energy is only two ounces. Think about it - you get more energy and have less to drink. That means the energizing ingredients get into your system faster. It also means you don't have to carry a big can of sugary soda with you.

	5-Hour Energy	Popular Canned Energy Drink
Time to consume	**2oz** - Takes seconds to drink	**8oz to 24oz** Hope you're thirsty! This is going to take a while.
Refrigeration	None required Tastes great at room temperature	Better keep it cold unless you like warm soda
Portability	Fits in your pocket, purse, desk drawer, locker, glove box, carry on bag, etc.	Fits in your fridge. Yippee...
Closure	Don't want the whole bottle? Reseal the bottle and save the rest for later.	Drink it all now or drink it FLAT later.

NEW decaf
5-Hour Energy

Hours of energy with less caffiene than a cup of decaf.

Click here for 5-Hour Decaf Energy product information.

decaf
5-hour ENERGY

ï»¿

*Crash equals energy below baseline. Crash Effect Explained

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EXHIBIT 11

Hansen's

Hansen Natural Reports Record 2008 Second Quarter and Six Months Financial Results

Second Quarter Net Sales Rise 15.3 Percent to $282.2 Million; Net Income Increases 31.1 Percent to $50.2 Million

CORONA, Calif., Aug 7, 2008 (PrimeNewswire via COMTEX News Network) -- Hansen Natural Corporation (Nasdaq:HANS) today reported record sales and profits for the second quarter and six-months ended June 30, 2008.

Gross sales for the 2008 second quarter increased 15.5 percent to $324.1 million, from $280.6 million a year earlier. Net sales for the second quarter increased 15.3 percent to $282.2 million from $244.8 million a year ago.

Gross profit, as a percentage of net sales, for the 2008 second quarter was 51.8 percent compared with 52.4 percent in the comparable 2007 quarter and increased from 49.4 percent in the first quarter of 2008. The differences in gross profit as a percentage of net sales is primarily due to changes in product mix.

Operating expenses for the 2008 second quarter increased to $68.0 million from $66.8 million in the same quarter last year.

Distribution costs as a percentage of net sales were 5.5 percent for the quarter, compared with 5.4 percent in the same quarter last year.

Selling expenses as a percentage of net sales for the 2008 second quarter were 12.1 percent, compared with 10.6 percent a year ago. Increases in sponsorship expenditures, sampling activities and commissions, as well as costs relating to event and athlete sponsorships in the United Kingdom, contributed to the increase in such expenses over the prior year.

General and administrative expenses for the 2008 second quarter were $18.3 million compared with $27.6 million for the comparable quarter last year. Included in such expenses are costs associated with terminating existing distributors and legal and accounting fees relating to the special investigation of stock option grants, and granting practices and related litigation (see Certain Identified Items below). Stock based compensation (a non-cash item) was $3.7 million in the second quarter of 2008, compared with $2.0 million in the prior-year period.

Operating income for the 2008 second quarter increased 27.3 percent to $78.2 million from $61.4 million a year ago.

Net income for the second quarter of 2008 increased 31.1 percent to $50.2 million, or $0.51 per diluted share, compared with $38.3 million, or $0.39 per diluted share last year.

Net sales for the Company's DSD segment were $258.6 million for the three-months ended June 30, 2008, an increase of approximately $38.1 million, or 17.3 percent higher than net sales of $220.4 million for the three-months ended June 30, 2007. Net sales for the Company's warehouse segment were $23.7 million for the three-months ended June 30, 2008, a decrease of approximately $0.7 million, or 2.7 percent lower than net sales of $24.3 million for the three-months ended June 30, 2007.

Within the DSD segment, sales of Monster(r) and Java Monster(tm) drinks increased 22.3 percent during the 2008 second quarter while sales of Lost(r) Energy(tm), and other energy drinks were lower.

Sales to customers outside the United States were $19.5 million in the 2008 second quarter (including sales of approximately $1.9 million in the United Kingdom), compared with $13.4 million in the comparable quarter last year.

In the six-months ended June 30, 2008 gross sales increased 20.7 percent to $568.1 million from $470.7 million for the comparable period a year earlier. Net sales increased 20.4 percent to $494.4 million from $410.6 million for the comparable period a year earlier. Gross profit as a percentage of net sales was 50.8 percent for the first half of 2008 compared to 52.1 percent for the same period in 2007.

Operating expenses for the six-months ended June 30, 2008, increased to $129.9 million from $120.6 million in the same period last year (see Certain Identified Items below). Operating income increased 29.7 percent to $121.0 million from $93.3 million in the first six months of 2007.

Net income for the first half of 2008 increased 35.1 percent to $79.0 million, or $0.80 per diluted share, compared with $58.5

million, or $0.59 per diluted share, for the same period last year.

Rodney C. Sacks, chairman and chief executive officer, said that the record revenues and profits reflect continued strong sales of Monster Energy(r) and Java Monster(tm) drinks which continued to grow in excess of the category and gain market share.

"We are proud of the continued strong performance of the Monster(r) brand at a time when almost all categories of ready-to-drink beverages in the United States are experiencing weakness. This weakness is most pronounced in convenience store cold drink channels, where the vast majority of energy drinks are sold. We continue to believe that the moderating growth that we have seen in energy drinks appears, in part, to be due to the challenging macro economic environment and the resulting decline in store traffic primarily in the convenience and gas sector especially in Southern California," added Sacks.

In the first six months of 2008 the Company experienced increased costs of certain raw materials principally apple juice concentrate, aluminum cans and sugar which had a greater impact on the warehouse segment than on the DSD segment.

During the three-months ended June 30, 2008 the Company purchased 1.7 million shares of common stock at an average purchase price of $29.46 per share which the Company holds in treasury.

Certain Identified Items

Contributions net of reimbursements totaling ($0.4) million and $6.5 million for the three-months and ($0.4) million and $19.8 million for the six-months, ended June 30, 2008 and 2007, respectively, were recorded by the Company related to Anheuser-Busch distributors for their contributions to offset the costs of terminating prior distributors. Such amounts have been accounted for as deferred revenue, and are being recognized as revenue ratably over the anticipated 20-year life of the respective Anheuser-Busch distribution agreements. Revenue recognized was $0.5 million for the three-months and $1.0 million for the six-months ended June 30, 2008 and 2007, respectively.

In connection with the transition of certain of the Company's distribution arrangements, the Company incurred termination costs amounting to $0.1 million and $8.4 million in the three-months and $0.1 million and $14.7 million in the six-months, ended June 30, 2008 and 2007, respectively, to certain of its prior distributors, who have been replaced by Anheuser-Busch distributors. Such termination costs have been expensed in full and are included in operating expenses for the corresponding periods.

In connection with the Company's special investigation of stock option grants and granting practices, related litigation and other related matters, the Company incurred professional service fees, net of insurance proceeds, of ($0.4) million and $4.2 million for the three-months and ($0.2) million and $10.9 million for the six-months ended June 30, 2008, and 2007 respectively, which have been fully expensed in the respective periods.

The following table summarizes the identified items discussed above for the three and six-months ended June 30, 2008 and 2007:

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2008	2007	2008	2007
	(In Thousands)	(In Thousands)	(In Thousands)	(In Thousands)
Deferred Revenue:				
Contributions from, net of reimbursements to, Anheuser-Busch Distributors	$ (412)	$ 6,497	$ (365)	$ 19,847
Recognition of deferred revenue	$ 493	$ 509	$ 1,016	$ 936
Operating Expenses:				
Termination payments to prior distributors	$ 150	$ 8,353	$ 150	$ 14,700
Professional service fees (net of insurance proceeds) associated with the review of stock				

option grants and granting practices, related litigation and other related matters	$ (430)	$ 4,221	$ (200)	$ 10,905

Auction Rate Securities

At June 30, 2008 the Company held auction rate securities with a face value of $129.8 million ($207.5 million at March 31, 2008). Additional redemptions amounting to $8.9 million were received by the Company during July. The Company determined that a temporary impairment of $5.8 million had occurred at June 30, 2008 and recorded a charge of $3.4 million net of taxes as a component of accumulated other comprehensive loss for the six-months ended June 30, 2008. These securities will continue to accrue interest at their contractual rates until their respective auctions succeed or they are redeemed.

"Based on our ability to access cash and other short term investments and based on our expected operating cash flows, we do not anticipate that the current lack of liquidity of these investments will have a material effect on our liquidity or working capital," Sacks said.

The Company will host an investor conference call on August 7, 2008 at 2:00 p.m. Pacific Time (5:00 p.m. Eastern Time). The conference call will be open to all interested investors through a live audio web broadcast via the internet at www.hansens.com and www.opencompany.info. For those who are not able to listen to the live broadcast, the call will be archived for approximately one year on both websites.

Hansen Natural Corporation

Based in Corona, California, Hansen Natural Corporation markets and distributes Hansen's(r) Natural Sodas, sparkling beverages, fruit juice Smoothies, Energy drinks, Energade(r) energy sports drinks, multi-vitamin juice drinks in aseptic packaging, iced teas, apple juice and juice blends, Junior Juice(r) juices, Blue Sky(r) brand beverages, Monster Energy(r) brand energy drinks, Java Monster(tm) brand non-carbonated dairy based coffee drinks, Lost(r) Energy(tm) brand energy drinks, Joker Mad Energy(tm), Unbound(r) Energy and Ace(tm) Energy brand energy drinks, Rumba(tm), Samba and Tango brand energy juices. For more information visit www.hansens.com and www.monsterenergy.com.

Gross sales, although used internally by management as an indicator of operating performance, should not be considered as an alternative to net sales, which is determined in accordance with accounting principles generally accepted in the United States of America ("GAAP"), and should not be used alone as an indicator of operating performance in place of net sales. Additionally, gross sales may not be comparable to similarly titled measures used by other companies as gross sales has been defined by our internal reporting requirements. However, gross sales is used by management to monitor operating performance including sales performance of particular products, salesperson performance, product growth or declines and our overall performance. The use of gross sales allows evaluation of sales performance before the effect of any promotional items, which can mask certain performance issues. Management believes the presentation of gross sales allows a more comprehensive presentation of our operating performance. Gross sales may not be realized in the form of cash receipts as promotional payments and allowances may be deducted from payments received from customers.

Certain statements made in this announcement may constitute "forward-looking statements" within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended, regarding the expectations of management with respect to revenues and profitability. Management cautions that these statements are qualified by their terms or important factors, many of which are outside of the control of the Company, that could cause actual results and events to differ materially from the statements made herein, including, but not limited to, the following: changes in consumer preferences; changes in demand that are weather related, particularly in areas outside of California; competitive pricing and/or marketing pressures; activities and strategies of competitors; changes in the price and/or availability of raw materials for the Company's products; the availability of production and/or suitable facilities; the marketing efforts of the distributors of the Company's products, most of which distribute products that are competitive with the products of the Company; the introduction of new products, as well as unilateral decisions that may be made by grocery and/or convenience chain stores, specialty chain stores, club stores and other customers to discontinue carrying all or any of the Company's products that they are carrying at any time; and other risks detailed from time to time in the Company's reports filed with the Securities and Exchange Commission. The Company's actual results could differ materially from those contained in the forward-looking statements. The Company assumes no obligation to update any forward-looking statements.

HANSEN NATURAL CORPORATION AND SUBSIDIARIES
CONDENSED CONSOLIDATED STATEMENTS OF INCOME AND OTHER INFORMATION
FOR THE THREE- AND SIX-MONTHS ENDED JUNE 30, 2008 AND 2007

(In Thousands, Except Per Share Amounts) (Unaudited)

	Three-Months Ended June 30,		Six-Months Ended June 30,	
	2008	2007	2008	2007
Gross sales, net of discounts & returns*	$324,134	$280,582	$568,132	$470,651
Less: Promotional and other allowances**	41,890	35,819	73,710	60,036
Net sales	282,244	244,763	494,422	410,615
Cost of sales	136,031	116,510	243,489	196,726
Gross profit	146,213	128,253	250,933	213,889
Gross profit margin as a percentage of net sales	51.8%	52.4%	50.8%	52.1%
Operating expenses (1)	68,023	66,830	129,916	120,557
Operating expenses as a percentage of net sales	24.1%	27.3%	26.3%	29.4%
Operating income	78,190	61,423	121,017	93,332
Operating income as a percentage of net sales	27.7%	25.1%	24.5%	22.7%
Interest and other income, net	2,769	1,752	6,395	3,278
Income before provision for income taxes	80,959	63,175	127,412	96,610
Provision for income taxes	30,727	24,864	48,369	38,101
Net income	$ 50,232	$ 38,311	$ 79,043	$ 58,509
Net income as a percentage of net sales	17.8%	15.7%	16.0%	14.2%
Net income per common share:				
Basic	$0.54	$0.43	$0.85	$0.65
Diluted	$0.51	$0.39	$0.80	$0.59
Case sales (in thousands) (in 192-ounce case equivalents)	28,716	26,950	50,990	46,345
Average net sales price per case	$ 9.83	$ 9.08	$ 9.70	$ 8.86

(1) Includes costs associated with terminating existing distributors and legal and accounting fees relating to the special investigation

of stock option grants and granting practices and related litigation, net of insurance proceeds.

* Gross sales, although used internally by management as an indicator of operating performance, should not be considered as an alternative to net sales, which is determined in accordance with accounting principles generally accepted in the United States of America ("GAAP"), and should not be used alone as an indicator of operating performance in place of net sales. Additionally, gross sales may not be comparable to similarly titled measures used by other companies as gross sales has been defined by our internal reporting requirements. However, gross sales is used by management to monitor operating performance including sales performance of particular products, salesperson performance, product growth or declines and our overall performance. The use of gross sales allows evaluation of sales performance before the effect of any promotional items, which can mask certain performance issues. Management believes the presentation of gross sales allows a more comprehensive presentation of our operating performance. Gross sales may not be realized in the form of cash receipts as promotional payments and allowances may be deducted from payments received from customers.

** Although the expenditures described in this line item are determined in accordance with GAAP and meet GAAP requirements, the disclosure thereof does not conform with GAAP presentation requirements. Additionally, the presentation of promotional and other allowances may not be comparable to similar items presented by other companies. The presentation of promotional and other allowances facilitates an evaluation of the impact thereof on the determination of net sales and illustrates the spending levels incurred to secure such sales. Promotional and other allowances constitute a material portion of our marketing activities.

HANSEN NATURAL CORPORATION AND SUBSIDIARIES
CONDENSED CONSOLIDATED BALANCE SHEETS
AS OF JUNE 30, 2008 AND DECEMBER 31, 2007
(In Thousands, Except Share Amounts) (Unaudited)

	June 30, 2008	Dec. 31, 2007
ASSETS		
CURRENT ASSETS:		
Cash and cash equivalents	$182,953	$ 12,440
Short-term investments	22,066	63,125
Accounts receivable, net	83,404	81,497
Inventories	123,218	98,140
Prepaid expenses and other current assets	10,614	3,755
Deferred income taxes	11,902	11,192
Total current assets	434,157	270,149
INVESTMENTS	115,181	227,085
PROPERTY AND EQUIPMENT, net	9,238	8,567
DEFERRED INCOME TAXES		
	16,399	14,006
INTANGIBLES, net	24,723	24,066
OTHER ASSETS	774	730

	$600,472	$544,603
	========	========
LIABILITIES AND STOCKHOLDERS' EQUITY		
CURRENT LIABILITIES:		
Accounts payable	$ 71,272	$ 56,766
Accrued liabilities	11,791	9,019
Accrued distributor terminations	4,052	4,312
Accrued compensation	4,536	5,827
Current portion of capital leases	313	663
Income taxes payable	13,298	6,294
	--------	--------
Total current liabilities	105,262	82,881
DEFERRED REVENUE	38,174	39,555
COMMITMENTS AND CONTINGENCIES		
STOCKHOLDERS' EQUITY:		
Common stock - $0.005 par value; 120,000,000 shares authorized; 96,533,211 shares issued and 92,179,460 outstanding as of June 30, 2008; 95,848,711 shares issued and 93,191,191 outstanding as of December 31, 2007	483	479
Additional paid-in capital	105,919	96,749
Retained earnings	432,691	353,648
Accumulated other comprehensive loss	(3,429)	(47)
Common stock in treasury, at cost; 4,353,751 and 2,657,520 shares as of June 30, 2008 and December 31, 2007, respectively	(78,628)	(28,662)
	--------	--------
Total stockholders' equity	457,036	422,167
	--------	--------
	$600,472	$544,603
	========	========

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EXHIBIT 12

Mathematica Policy Research, Inc. v. Addison-Wesley Pub. Co., Inc.
S.D.N.Y.,1989.

United States District Court, S.D. New York.
MATHEMATICA POLICY RESEARCH, INC., Mathtech, Inc., and Mathematica Venture, Plaintiffs,
v.
ADDISON-WESLEY PUBLISHING COMPANY, INC., and Wolfram Research, Inc., Defendants.
No. 89 CIV. 3431 (JFK).

June 5, 1989.

Schwal & Platt, New York City, for plaintiffs; Neal R. Platt, of counsel.
Colton, Hartnick, Yamin & Sheresky, New York City, for Addison-Wesley Publishing Co. Inc.; Alan J. Hartnick, R. Charles Wright, of counsel.
Jenner & Block, Chicago, Illinois, for Wolfram Research Inc.; Ronald L. Wanke, of counsel.

OPINION and ORDER

KEENAN, District Judge.
***1** This is an action for trademark and service mark infringement, unfair competition, and violation of the New York anti-dilution and false advertising statutes commenced by plaintiffs Mathematica Policy Research, Inc., Mathtech, Inc., and Mathematica Venture against defendants Addison-Wesley Publishing Co., Inc. and Wolfram Publishing Research, Inc. Plaintiffs seek a temporary restraining order and preliminary injunction restraining defendants from using the mark MATHEMATICA, and the registered trademark MATH and service mark MATH II. For the reasons stated below, the Court denies plaintiffs' application.

FACTS

Plaintiffs are among the nation's leading policy research organizations. Plaintiffs have been using MATHEMATICA for at least 14 years in connection with their computer-intensive consulting services, and have been using the trademark MATH and service mark MATH II in connection with their computerized microeconomic simulation models since the early 1980's.

Plaintiffs allege that the defendant Wolfram Research is infringing their marks by using MATHEMATICA as the name of its mathematical software and by using MATH both as part of its toll-free phone number and as the command to by typed by a personal computer in order to run its software. Plaintiffs allege that defendant Addison-Wesley is infringing the marks by using MATHEMATICA as the title of the accompanying manual for Wolfram Research's software published by Addison-Wesley, and by inserting advertisements in the manual using MATH as part of Wolfram Research's toll-free phone number.

Plaintiffs maintain that they are entitled to injunctive relief because defendants, who have heretofore confined their software to the esoteric UNIX and MACINTOSH operating systems are about to commence shipment of a "bug-ridden" software version designed to run on the DOS operating system, with the potential of irreparably damaging plaintiffs' reputation. The DOS operating system accounts for 85% of business-class personal computers and virtually 100% of personal computers accessing plaintiffs' MATH microeconomic simulation model. Plaintiffs' allege that the likelihood of confusion caused by defendants' use of these identical marks is heightened by the DOS-based version's ability to run on the same personal computers used to download data generated by plaintiffs' MATH model.

DISCUSSION

A party seeking a temporary restraining order or a preliminary injunction must demonstrate "(a) a risk of irreparable harm and (b) either (1) a likelihood of success on the merits or (2) the existence of sufficiently serious questions going to the merits and a balance of hardship decidedly favoring the party seeking relief." *McNeilab, Inc. v. American Home Products Corp.,* 848 F.2d 34, 37 (2d Cir.1988). In this Circuit, significant delay in applying for preliminary injunctive relief may preclude granting

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the requested relief. *See Majorica, S.A. v. R.H. Macy & Co., Inc.*, 762 F.2d 7, 8 (2d Cir.1985). Lack of diligence in applying for preliminary injunctive relief " 'undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.' " *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir.1985) (citation omitted). The period that the movant allows to elapse prior to applying for relief need "not rise to the level of laches" to bar preliminary injunctive relief. *Id.* at 276. With these principles in mind, the Court finds that plaintiffs' appreciable delay in seeking relief belies their contention that imminent irreparable harm is at hand.

***2** The record before the Court evidences that plaintiffs became aware of defendants' use of the MATHEMATICA mark no later than mid-July, 1988. At that time, Wolfram's Manager of Business Development received a telephone call from plaintiffs' attorney concerning Wolfram's use of the MATHEMATICA mark. Pursuant to that telephone conversation, the Manager forwarded information on Wolfram's use of the MATHEMATICA mark to plaintiffs' attorney.

On September 28, 1988, the Manager received a letter from plaintiffs' counsel acknowledging receipt of the information. The letter further posited that "under certain circumstances" a trademark infringement could be present and that Wolfram could continue to use the MATHEMATICA mark only if it reached an "accommodation" based on a "percentage of [Wolfram's] gross revenue from the product bearing the mark." Cochrane Aff., Exh. F. On October 31, 1988, plaintiffs' counsel sent a letter to Wolfram's counsel demanding that Wolfram "cease and desist from all use of the mark." Hartnick Aff., Exh. E. This demand was the last communication either defendant received from plaintiffs prior to the filing of the instant complaint on May 17, 1989.

Plaintiffs assert that a measure of prudence rather than a lack of diligence led them to delay in seeking preliminary injunctive relief. They contend that they did not believe they could establish a case of infringement until they learned of defendant Wolfram's use of MATHEMATICA in connection with DOS-based software upon reading a review of Wolfram's software published on March 28, 1989. This contention is belied by plaintiffs' counsel's letter of October 31, 1988 which reflects plaintiffs' belief on that date that the alleged infringement was at hand. Moreover, even if the alleged infringement could not have been established prior to the release of Wolfram's DOS-based software, plaintiffs should have been aware of the impending release of the DOS-based software long before reading a review published on March 28, 1989.

Since November, 1988, the defendants included on Wolfram's general brochure a flyer which heralded the impending release of the DOS-based software. The DOS-based software itself has been available and shipped to purchasers since January, 1989. The third printing of the allegedly infringing book *Mathematica, A System For Doing Mathematics By Computer*, in January, 1989, advertised the DOS-based software on its back cover. The third printing of the book is widely available in bookstores across the United States. With this variety of information available to plaintiffs for no fewer than three and one-half months, their failure to seek injunctive relief prior to May 17, 1989 in great measure dissipates their assertion of irreparable harm. *See e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir.1985) (ten week delay in seeking preliminary injunctive relief sufficient to bar grant of preliminary injunction).

CONCLUSION

***3** For the foregoing reasons, the Court denies plaintiffs' application for preliminary injunctive relief. Discovery is to proceed. The parties are directed to appear before the Court for a status conference on July 20, 1989 at 10:00 a.m. in Courtroom 444.

SO ORDERED.

S.D.N.Y.,1989.
Mathematica Policy Research, Inc. v. Addison-Wesley Pub. Co., Inc.
Not Reported in F.Supp., 1989 WL 63075 (S.D.N.Y.), 11 U.S.P.Q.2d 1391

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EXHIBIT 13

Whittier College v. American **Bar Ass'n**
C.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,C.D. California.
WHITTIER COLLEGE
v.
AMERICAN **BAR ASS'N**
No. CV 07-1817 PA.

May 7, 2007.

Paul R. Kiesel, William L. Larson, Kiesel Boucher & Larson, Beverly Hills, CA, for Whittier College.
Anne E. Rea, Daniel M. Twetten, David T. Pritkin, Michael P. Doss, Robert Mark Stone, Sidley Austin, Los Angeles, CA, for American Bar Ass'n.

CIVIL MINUTES-GENERAL

ANDERSON, J.

C. Kevin Reddick	Bridget Montero	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Paul Kiesel	Patricia Larson
William Larson	Robert Stone
	Anne Rea

Proceedings: Application for Preliminary Injunction

***1** Before the Court is a Motion for Preliminary Injunction filed by plaintiffs Whittier College and Whittier Law School (collectively "Whittier") (Docket No. 5). Whittier seeks injunctive relief against defendants the American Bar Association ("ABA") and the ABA's Council of the Section of Legal Education and Admissions to the Bar (the "Council") preventing the ABA from revoking Whittier's status as an ABA-approved law school. Whittier also seeks mandatory injunctive relief requiring the ABA to revoke the ABA's August 2005 decision placing Whittier on probation and to delete all references to Whittier's probationary status from all ABA websites and publications. Finally, Whittier requests that the Court enjoin the ABA from placing Whittier on probation for a period of five years and to forbid the ABA from proceeding against Whittier except in compliance with the ABA's published standards, interpretations, and rules of procedure.

I. *Factual Background*

The Council is recognized by the United States Department of Education as the accrediting agency for law schools. An accredited law school qualifies for federal student loans and many states require graduation from an ABA-accredited law school to become a member of the bar. The Council's accreditation process, which the ABA calls "approval," is governed by the ABA's Rules of Procedure. In making its decisions, the Council is assisted by the Accreditation Committee (the "Committee"). The Committee and Council apply the ABA's published Standards for Approval of Law Schools (the "Standards") and Interpretations (the "Interpretations") which help clarify the Standards.

The Committee and Council monitor schools to ensure that they operate in compliance with the Standards. Among other methods, the ABA monitors schools through site visits. Following an inspection, the site team issues a report which is provided to the Committee and the school. The Committee considers the site visit report and any comments and evidence submitted by the school before making findings of fact and conclusions regarding the school's compliance with the Standards. These written findings of fact and conclusions are provided to the

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school. Representatives from the school may appear before the Committee and be represented by counsel. A school's appearance before the Committee is transcribed.

If the Committee concludes that it has reason to believe that a school is not in compliance with the Standards, the Committee will notify the school in writing of its concern and request additional information from the school. If, after reviewing additional information, the Committee determines that the school has not demonstrated compliance, the Committee may order the school to show cause why it should not be required to take appropriate remedial action or be sanctioned. Sanctions may include monetary penalties, censure, probation, and removal from the list of ABA-approved schools. When the Council considers a recommendation from the Committee to impose sanctions, the Council will consider the Committee's findings of fact and conclusions, the record before the Committee, and may permit the school to submit additional evidence. The school may appear before the Council and be represented by counsel. The school's appearance before the Council is transcribed. The Council then issues a written decision which is provided to the school.

***2** When it decides that probation is warranted, the Council sets a time limit for the school to come into compliance. This time period may not exceed two years unless the Committee or Council extends the probationary period for good cause. If the Committee decides at the end of a school's period of probation that the school has not established that it is in compliance, and there is no cause to extend probation, the Committee may recommend that the Council remove the school from the list of ABA-approved schools. If the Council agrees to remove the school from the approved list, the school may appeal the decision to the ABA's House of Delegates.[FN1] A school's removal from the approved list is stayed pending a decision by the House of Delegates. Any student who enrolls in an ABA-approved school prior to the decision to remove the school from the approved list becoming final is considered to have graduated from an ABA-approved school.

FN1. The control and administration of the ABA is vested in the House of Delegates, the policy-making body of the association.

Whittier became an ABA-approved law school in 1985. The school moved from Los Angeles to Costa Mesa in 1997. Soon after moving to Costa Mesa, the first time success rate of Whittier's graduates on the California bar examination plummeted. In 1999, the Committee and Council communicated their concerns about Whittier's first-time passage rate on the California bar examination to Whittier.[FN2] In many of these communications, the Committee expressed its concern that Whittier's "graduates are less successful on the California bar examination than graduates of other ABA-approved law schools in California." *See* Cogan Declaration, Exhibits 4, 9, 10 & 11. As a result of the unfavorable comparison between Whittier's bar passage rate and the passage rate of the other ABA-approved law schools in California, the Committee concluded that Whittier had not established compliance with Standard 301(a), which states: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." The Committee also found that Whittier had not established compliance with Interpretation 301-1, which provided: "Among the factors to be considered in assessing the extent to which a law school complies with [Standard 301] are the attrition rate of the school's students, and the bar passage and career placement rates of its graduates."[FN3]

FN2. The Committee had previously cited Whittier for its low bar first-time passage rate in 1992, 1993, 1994 and 1995. *See* Cogan Declaration, Ex. 14, p. 212-13.

FN3. Interpretation 301-1 was amended and renumbered in 2004. The revised Interpretation 301-3 states: "Among the factors to be considered in assessing the extent to which a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rates of its graduates." Unless otherwise noted, the Court will refer to Interpretation 301-3.

In responding to the Committee's concerns, Whittier frequently compared its first-time bar passage rate to the overall bar passage rate of students from California's ABA-approved law schools. *See* Cogan Declaration, Exhibits 7, 8, 18, 22, 23 & 24. Indeed, as both the ABA and Whittier acknowledge, both in their submissions to the Court and in more than six years of correspondence, with only one exception, Whittier's first-time bar passage rate has been persistently and substantially below the average for all California ABA-approved law schools

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since at least the February 1997 California bar examination:

Examination	All California ABA-approved	Whittier	Difference
February 1997	69.8	60.9	-8.9
July 1997	82.4	67.9	-14.5
February 1998	62.8	73.9	11.1
July 1998	72.1	45.9	-26.2
February 1999	55.8	55.6	-0.2
July 1999	69	43	-26
February 2000	50	26	-24
July 2000	74	54	-20
February 2001	50	28	-22
July 2001	79	50	-29
February 2002	52	38	-14
July 2002	72	42	-30
February 2003	57	25	-32
July 2003	72	31	-41
February 2004	49	24	-25
July 2004	69	41	-28
February 2005	58	33	-25
July 2005	70	40	-30
February 2006	60	38	-22
July 2006	74	59	-15

***3** In light of its poor performance on the bar examination in comparison to the other California ABA-approved law schools, and after determining that Whittier's initial efforts to improve its bar passage rate had not resulted in any noticeable improvement, the Committee, in June 2004, ordered Whittier to show cause why it should not be required to take appropriate remedial action, be placed on probation, or be removed from the list of ABA-approved law schools. *See* Cogan Declaration, Ex. 12. The Committee conducted a hearing on its order to show cause in April 2005. Accompanied by counsel, Whittier Law School's Dean and Whittier College's President appeared at the hearing. In its April 2005 Recommendation, the Committee noted that "beginning in 1996, a significant double-digit gap developed between the School's first-time passage rate and the passage rate for all other ABA-approved schools in California."*Id.,* Ex. 14, p. 214. The Committee concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent."*Id.* at p. 220.The Committee recommended that the Council place Whittier on probation for two years and require that Whittier demonstrate compliance with Standard 301 and Interpretation 301-3 before being removed from probation. *Id.* Whittier appealed the Committee's recommendation to the Council.

In August 2005, the Council considered the Committee's recommendation along with the arguments and evidence submitted in support of Whittier's appeal. Representatives from Whittier, including the Dean, President, Chairman of the Board of Trustees, and outside counsel appeared at the Council's meeting. In adopting the Committee's April 2005 findings of fact, the Council found that the Committee's findings were supported by substantial evidence. *Id.,* Ex. 15, p. 240. The Council concluded that Whittier "has not demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-3 and that the Law School's noncompliance is substantial and has been persistent."*Id.* at p. 250.The Council placed Whittier on probation for two years. *Id.* at p. 251.The Council further determined that in order to be taken off probation prior to or at the end of the two year period, Whittier must demonstrate compliance with Standard 301(a) and Interpretation 301-3. *Id.* The Council also required Whittier to submit a plan for bringing the school into compliance with Standard 301(a) and Interpretation 301-3 by October 2005.

Since being placed on probation in August 2005, Whittier has submitted its remedial plan and adopted a "small school" model with reduced enrollment and higher admission standards. According to Whittier, its probationary status has made it more difficult to improve its bar passage results. Several of its faculty have left, students, including some of Whittier's most successful, have transferred to other schools, and the smaller class size has reduced the school's financial resources. Despite these challenges, Whittier's success rate on the July 2006 California bar exam improved by 19 points from the prior year from 40% to 59%. Even the 59% pass rate was, however, 15% below the average for all California ABA-approved schools.

***4** In light of the improvement, Whittier petitioned the Committee in December 2006 to remove the school from probation. Although noting the progress made by Whittier, the Committee declined to remove Whittier from probation prior to the expiration of the two-year probationary period in January 2007. In rejecting Whittier's request, the Committee issued a written decision which concluded that Whittier "has not yet demonstrated that it is in compliance with Standard 301(a) and Interpretation 301-[3]."*Id.,* Ex. 25, p. 798. Whittier appealed the Committee's denial of its request to the Council. In February 2007, the Council considered Whittier's appeal. Representatives from Whittier, including the Dean, President, and Chairman of the Board of Trustees appeared at the Council's meeting. *Id.* at Ex. 26. Following its review of the Committee's decision and the evidence submitted in support of Whittier's appeal, the Council concurred in the Committee's conclusion that Whittier was still not in compliance with Standard 301 and Interpretation 301-3. *Id.* As a result, Whittier remains on probation at least through August 2007.

On March 19, 2007, following the denial of its appeal, Whittier commenced this action. In its Complaint, Whittier alleges that the ABA has violated its rights to due process under Federal and California common law. Specifically, Whittier contends that in assessing its compliance with Standard 301(a) and Interpretation 301-3, the ABA has applied "unapproved and unpublished" criteria. In support of its allegations, Whittier asserts that Hulett Askew, the ABA's Consultant on Legal Education, has admitted that rather than relying on the flexible guidelines for bar passage contained in Standard 301 and Interpretation 301-3, the ABA actually applies a strict objective numerical requirement. In testimony before the United States Department of Education in December 2006, Mr. Askew stated:

If [the] bar passage is over 70 percent for the graduating students in the main State in which the school is located, there typically is no problem with that law school. However, if that law school is more than ten points below the ABA State average in that [State], for instance, if the State average for all ABA schools is 90 percent, and the law school is at 75 percent, we may request additional information from the school as to why you are falling below your sister law schools in your State.

So if it's above 70 percent and within ten points of the average, there's typically no problem. If it is between 70 and 60, I'll discuss that in a minute. If it's below 60 percent for the main jurisdiction in which the students take the exam, we will always request additional information from the law school in terms of what additional information it can provide us, the Accreditation Committee, at the first cut about bar passage in that State.

Patton Declaration, Ex. 4, p. 95-96. Whittier further contends that the ABA's March 2007 publication of a proposed amendment to the Standards, which would add Interpretation 301-6 provides additional evidence that the ABA has enforced a "secret" bar passage requirement. The proposed Interpretation 301-6 states:
***5** In considering bar passage rates when determining a school's compliance with Standards 301(a) and 501(b), the first-time bar passage rates of a school's graduates for the most recent three years in the three jurisdictions in which the largest number of the school's graduates take the bar examination are initially reviewed. If data demonstrate to the Accreditation Committee that the school's first-time bar passage rates frequently are seventy percent or below, the school shall be asked to provide additional information in order to demonstrate compliance with the Standards. Such additional information may include, without limitation, first-time bar passage rates for a number of years in other jurisdictions in which a substantial number of the school's graduates take the bar examination, second-time taker bar passage rates of the

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school's graduates for a number of years, and ultimate bar passage rates of the school's graduates for a number of years; and, for the previous three years, information on academic support, attrition rates, bar preparation programs, and the entering credentials of students.

Supplemental Cogan Declaration, Ex. 2, p. 7; *see alsoid.* at p. 5 ("The 'trigger of 70% or below is the benchmark that the Accreditation Committee has most frequently used in recent years.").

II. *Legal Standard for Issuance of a Preliminary Injunction*

Whittier filed its Motion for Preliminary Injunction one day after commencing this action. To obtain a preliminary injunction in the Ninth Circuit, a party must demonstrate: "(1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor."*Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1201 (9th Cir.1980); *accordTextile Unlimited, Inc. v. A..BMH Co., Inc.,* 240 F.3d 781, 786 (9th Cir.2001)." 'These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." ' *MAI Systems Corp. v. Peak Computer, Inc.,* 991 F.2d 511, 516-17 (9th Cir.1993) (quoting *Diamontiney v. Borg,* 918 F.2d 793, 795 (9th Cir.1990)). " 'Where a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor." ' *Id.* at 1517 (quoting *Bernard v. Air Line Pilots Ass'n, Int'l,* 873 F.2d 213, 215 (9th Cir.1989)). Delay in requesting injunctive relief may rebut an allegation of irreparable harm. *SeeMiller v. Cal. Pac. Med. Ctr.,* 991 F.2d 536, 544 (9th Cir.1993) (" 'Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." ') (quoting *Oakland Tribune, Inc. v. Chronicle Publ'g Co.,* 762 F.2d 1374, 1377 (9th Cir.1985)).

***6** For purposes of injunctive relief, " 'serious questions' refers to questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo."' *Gilder v. PGA Tour, Inc.* 936 F.2d 417, 422 (9th Cir.1991) (quoting *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1362 (9th Cir.1988); *see alsoid.*("Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a 'fair chance of success on the merits." '). "Under any formulation of the test, the moving party must demonstrate a significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir.1987) (citing *Oakland Tribune, Inc.,* 762 F.2d 1374 at 1376). Additionally, in cases " 'where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff." ' *Harris v. Board of Supervisors,* 366 F.3d 754, 760 (9th Cir.2004) (quoting *Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391, 1400 (9th Cir.1992)). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial District Court,* 303 F.3d 959, 974 (9th Cir.2002).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."*Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162 (1997). However, a preliminary injunction "is not a preliminary adjudication on the ultimate merits."*Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1423 (9th Cir.1984)."[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."*University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981); *see alsoSierra On-Line,* 739 F.2d at 1423 (for preliminary relief, the court need only find a probability that necessary facts will be established, not that such facts actually exist).

In seeking mandatory injunctive relief in addition to a prohibitory injunction, Whittier acknowledges that some of the injunctive it seeks goes well beyond maintaining the status quo. *Stanley v. University of S. Cal.,* 13 F.3d 1313, 1320 (9th Cir.1994) ("A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo *pendente lite* and is particularly disfavored.' When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and law clearly favor the moving party." ') (citations omitted) (quoting *Anderson v. United States,* 612 F.2d 1112, 1114 (9th Cir.1979)); *Martin v. International Olympic Comm.,* 740 F.2d 670, 675 (9th Cir.1984) ("In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite,* courts should be extremely cautious about issuing a preliminary injunction."); Anderson, 612 F.2d at 1115 (" '[M]andatory injunctions, however, are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." ') (quoting *Clune v. Publishers' Assn.,* 214 F.Supp. 520 (S.D.N.Y.1963)).

III. *Analysis*

***7** Although Whittier has characterized its claims as arising under "common law due process," because the ABA is a private organization, it is more accurate to characterize the claims as arising under Whittier's rights to "fair procedure." *SeeThomas M. Cooley Law School v. ABA,* 459 F.3d 705, 711 (6th Cir.2006) ("Many courts, including this one, recognize that 'quasi-public' professional organizations and accrediting agencies such as the ABA have a common law duty to employ fair procedures when making decisions affecting their members. Courts developed the right to common law due process as a check on organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing.") (citations omitted); *see alsoApplebaum v. Bd. of Directors of Barton Mem'l Hosp.,* 104 Cal.App.3d 648, 657, 163 Cal.Rptr. 831, 836 (1980) ("The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights.").

Whether a fair procedure claim is brought pursuant to federal or California law, the legal analysis a court performs is nearly identical. In assessing a federal fair procedure claim, courts review "only whether the decision of an accrediting agency such as the ABA is arbitrary and unreasonable or an abuse of discretion and whether the decision is based on substantial evidence."*Thomas M. Cooley Law School,* 459 F.3d at 712. Similarly, under California law, "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner.... [W]henever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair."*Pinsker v. Pac. Coast Soc'y of Orthodontists,* 12 Cal.3d 541, 550, 126 Cal.Rptr. 245, 251-52 (1974). Because of the similarities between fair procedure claims, the Court concludes that the result it reaches would be the same whether it is analyzed under federal or California law. As a result, the Court, at least at this stage, need not determine if Whittier's state law claim is preempted by federal law. *CompareKeams v. Tempe Technical Inst., Inc.,* 39 F.3d 222 (9th Cir.1994) (finding no preemption of state law wrongful accreditation claim brought by student against accrediting agency) *withThomas M. Cooley Law School,* 459 F.3d at 712 ("Federal courts have exclusive jurisdiction over any action brought by a school challenging an accreditation decision made by an organization approved by the Secretary (such as the ABA). This grant of exclusive federal jurisdiction necessarily implies that federal law should govern disputes relating to decisions made by those bodies. It would make little sense for state law to govern claims that could not be heard in any state court.") (citing 20 U.S.C. § 1099b(f)*andChicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools & Colls.,* 44 F.3d 447, 450 (7th Cir.1994) (declining to follow *Keams*)).

***8** The standard of review on a fair procedure claim is even more deferential than the review a court undertakes in an action brought pursuant to the Administrative Procedure Act:

Although accrediting agencies perform a quasi-governmental function, they are still private organizations. Courts have made the policy decision to ensure that these organizations act in the public interest and do not abuse their power, but judicial review is limited to protecting the public interest. Recognizing that "the standards of accreditation are not guides for the layman but for professionals in the field of education," great deference should be afforded the substantive rules of these bodies and courts should focus on whether an accrediting agency such as the ABA followed a fair procedure in reaching its conclusions. We are not free to conduct a *de novo* review or substitute our judgment for that of the ABA or its Council.

Thomas M. Cooley Law School, 459 F.3d at 713 (citing 5 U.S.C. § 706(2)(A) and quoting *Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schools,* 957 F.2d 210, 214 (5th Cir.1992)); *see alsoid.*("[I]n analyzing whether the ABA abused its discretion or reached a decision that was arbitrary or unreasonable, we focus on whether the agency 'conform[ed] its actions to

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fundamental principles of fairness." ') (quoting Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schools, 817 F.2d 1310, 1314 (9th Cir.1987)); W. State Univ. Of S. Cal. v. American Bar Ass'n, 301 F.Supp.2d 1129, 1135 (C.D.Cal.2004) ("The Court's review is very deferential, but review includes the inquiry whether the accrediting body followed its own rules.").

A. *Likelihood of Success on the Merits/Serious Questions*

Given the number of hearings and opportunities Whittier has had to present evidence to the Committee and Council, it cannot seriously argue that the ABA violated its procedural rules. Whittier had adequate notice of each hearing, was provided with written decisions, was represented by counsel, was allowed to appear at hearings, was permitted to supplement the record with additional evidence, and took appeals of the Committee's adverse rulings to the Council. Instead, Whittier contends that despite the flexible guideline codified in Standard 301(a) and Interpretation 301-3, it has actually been subject to a far stricter "secret" numerical bar passage requirement. Relying on the December 2006 testimony of Mr. Askew before the United States Department of Education and the recent promulgation of proposed Interpretation 301-6, Whittier claims that this "unpublished and unapproved" criteria for bar passage rates has denied it a fair procedure by giving it no notice of the actual standard against which the ABA was measuring it.

The Court concludes that Whittier has little likelihood of success on the merits of its claims. Nor has Whittier raised a serious question. There appears to be little that is new or different about either Mr. Askew's testimony or proposed Interpretation 301-6. Both are, as Mr. Askew and proposed Interpretation 301-6 make clear, merely a "trigger" for further review. That further review, as Whittier appears to have known all along, measures a law school's bar passage rate against the bar passage rates of other ABA-approved schools in the same jurisdiction. There is little evidence that the ABA's conclusions concerning Whittier's failure to establish compliance with Standard 301(a) and Interpretation 301-3 were arbitrary or without substantial evidentiary support. The ABA consistently and repeatedly expressed its concern that Whittier failed to establish compliance with Standard 301(a) and Interpretation 301-3 given the fact that its bar passage rate was persistently and substantially below the average for ABA-approved schools in California. The ABA was not alone in measuring Whittier's bar passage rate against the other ABA-approved schools in California. Indeed, that is precisely how Whittier measured itself when responding to the ABA's concerns. Put simply, and particularly in light of the "great deference" to which the decisions of the ABA are entitled, the Court finds that Whittier has failed to raise serious questions or to establish a likelihood of success on the merits of its claims.

B. *Irreparable Injury/Balance of Hardships*

***9** Though significant, the harm suffered by Whittier as a result of the ABA's decision to place the school on probation does not justify the issuance of preliminary injunctive relief. Importantly, after being placed on probation in August 2005, Whittier waited approximately eighteen months before filing this action and bringing its Motion for Preliminary Injunction. Such a delay rebuts any contention of irreparable injury. *See*Miller, 991 F.2d at 544;*Oakland Tribune, Inc.*, 762 F.2d at 1377;*see also*Richard Feiner & Co. v. Turner Entm't Co., 98 F.3d 33, 34 (2d Cir.1996) ("The presumption [of irreparable harm] may be rebutted, if the defendant is able to demonstrate that the plaintiff delayed in bringing an action requesting preliminary injunctive relief.") (holding eighteen-month delay in seeking injunctive relief rebutted presumption of irreparable harm); High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc., 49 F.3d 1551, 1557 (Fed.Cir.1995) ("Absent a good explanation, not offered or found here, 17 months is a substantial period of delay that militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief."); Playboy Enters., Inc. v. Netscape Commc'ns Corp., 55 F.Supp.2d 1070, 1090 (C.D.Cal.1999) (finding five month delay in seeking injunctive relief "demonstrates the lack of any irreparable harm").

Whittier claims that it moved quickly in bringing this action and seeking injunctive relief once it became aware of the ABA's use of "unpublished and unapproved" criteria. As the Court explained earlier, there appears to be little that is new or different about either Mr. Askew's December 2006 testimony or proposed Interpretation 301-6. Whittier has known for years that the performance of its graduates on the bar examination was being measured against the bar passage rates of the other ABA-approved schools in California. Moreover, the harm Whittier claims to have suffered must have begun when it was placed on probation. This is true regardless of whether the school is correct when it alternatively alleges that the ABA either failed to give the school adequate notice of the standard against which it was being measured or was applying a "secret" standard. At a minimum, Whittier was put on notice of the way in which the ABA analyzed bar passage information in December 2005 when ABA sent a memorandum to its member schools explaining the use of bar passage data in the accreditation process. *See* ABA Exh. 4. The December 2005 Memorandum notified member schools that the Committee and Council "do not apply Standard 301(a) to require that a school's graduates have any specific minimum bar passage rate. Adopting such a rigid standard would be unrealistic in light of the wide variation in bar passage rates and minimum score requirements that exist across jurisdictions in the United States."*Id.,* p. 193.The December 2005 Memorandum further stated:

***10** In examining bar passage data, the Accreditation Committee and the Council initially do focus on first-time bar passage success of a school's graduates in the jurisdictions in which the largest number of the school's graduates sit for the bar....

If examination of those first-time bar passage data indicate concerns as to a school's compliance with Standard 301, however, the school is encouraged to gather and provide more extensive bar passage data, such as "ultimate" bar passage data for those of its graduates who take a bar examination more than once, and first-time and repeat-taker bar passage data for the school's graduates in any jurisdictions in which a substantial number of its graduates sit for a bar examination....

It also should be emphasized that, in considering bar passage data when determining compliance with Standard 301, the Accreditation Committee and the Council look at bar passage results over a number of administrations. One "bad" result in one administration of a bar examination is not likely to result in a school's being found out of compliance with Standard 301, and one "good" result is not likely to result in a school that is on report for non-compliance with Standard 301 being relieved of an obligation to continue to report on this issue.

Id. at p. 193-94.As a result of its delay of eighteen months prior to seeking injunctive relief, the Court concludes that Whittier cannot establish irreparable harm.

Nor does the balance of hardships tip sharply in Whittier's favor. Although being placed on probation has resulted in no small amount of difficulty for Whittier, the integrity of the ABA's accreditation process, and the interests of prospective students in being informed of the history of poor first-time bar passage rate of Whittier's graduates argues against the issuance of the injunctive relief Whittier seeks. The Court therefore concludes that neither the balance of hardships nor the public interest would be served by the issuance of injunctive relief.

IV. *Conclusion*

The Court applauds the efforts Whittier has made to promote diversity and address the challenge of increasing the level of minority participation in the legal profession. The Court also recognizes the improvement that Whittier's graduates achieved on the most recent California bar examination, as well as the efforts Whittier has made to improve the quality of its student body and educational programs since it was placed on probation by the ABA. Nevertheless, Whittier has not established its entitlement to the injunctive relief it seeks. Whittier's probationary period continues through at least August 2007. Whether Whittier should continue on probation beyond August 2007, or removed from the ABA's list of approved schools, is a decision which must be made, in the first instance, by the ABA. For all of the foregoing reasons, Whittier's Motion for Preliminary Injunction is denied.

The Court sets a Scheduling Conference for June 4, 2007, at 10:30 a.m. The parties' Federal Rule of Civil Procedure 26(f) Joint Report shall be filed by May 25, 2007.

***11** IT IS SO ORDERED.

C.D.Cal.,2007.
Whittier College v. American Bar Ass'n
Not Reported in F.Supp.2d, 2007 WL 1624100 (C.D.Cal.)

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EXHIBIT 14

For Businesses

Check Out a Business or Charity
Resource Library
Programs and Services
Complaints
Accreditation Standards
Advertising Review Services
- National Advertising Division
- Children's Advertising Review Unit
- Children's Food and Beverage Advertising Initiative
- Electronic Retailing Self-Regulation Program
- National Advertising Review Board
- National Advertising Review Council
- Code of Advertising

Find a BBB

National Advertising Division

The mission of the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) is to review national advertising for truthfulness and accuracy and foster public confidence in the credibility of advertisting. Policy and procedures for NAD are established by the National Advertising Review Council (NARC).

Sanctioned by the National Advertising Review Council

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EXHIBIT 15

Seeking Alpha α

Hansen Natural Corp. Q2 2008 Earnings Call Transcript

posted on: August 08, 2008 | about stocks: HANS

Hansen Natural Corp. (HANS)

Q2 FY08 Earnings Call

August 7, 2008, 05:00 PM EST

Executives

Rodney C. Sacks - Chairman and CEO

Hilton H. Schlosberg - Vice Chairman, President, CFO, COO and Secretary

Analysts

Judy Hong - Goldman Sachs

Kaumil Gajrawala - UBS

Mark Astrachan - Stifel Nicolaus

Gregory Badiskanian - Citigroup

Alex Paterson - RCM

Presentation

Operator

Good day, everyone and thank you for joining today's Hansen Natural Corporation's Second Quarter 2008 Financial Results Conference Call. Today's call is being recorded. For opening remarks, I'd like to turn the conference over to Chief Executive Officer, Mr. Rodney Sacks. Please do ahead sir.

Rodney C. Sacks - Chairman and Chief Executive Officer

Thank you. Good afternoon, ladies and gentlemen. This is Rodney Sacks speaking. Hilton Schlosberg, our Vice Chairman and President, he is with us today as is Tom Kelly, our Vice President of finance.

Firstly, I would like to thank you for attending the call and at this time, I would like to record that certain statements made on this call may constitute forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 as amended and Section 21E of the Securities Exchange Act of 1934 as amended, regarding the expectations of management with respect to revenues and profitability.

Management cautions that these statements are qualified by their terms, or important factors many of which are outside the control of the company that could cause actual results and events to differ materially from the statements made herein. The company assumes no obligation to update any forward-looking statements.

At the onset, I would like to apologize, I understand there was some delay in our results being transmitted across the wires and through the internet and this was due to circumstances beyond our control. They were released on yesterday, but that was apparently summing that just occurred... there were tremendous amount of other companies also reporting results at the same time after the close today.

But I understand that both the release has now gone across the internet and the 8-K has also been filed and has gone across the internet.

Our results for the quarter underscore our ability to continue delivering growth in both sales and profits despite the challenging macro economic environment in the United States. During the quarter, almost all categories of ready to drink beverages in the United States experienced weakness. This weakness is most pronounced in convenience store cold drink channels, where the vast majority of energy drinks are sold. We continue to believe that the moderating growth we have seen in energy drinks appears in part due to the challenging macro economic environment and the resulting decline in store traffic, primarily in the C&G sector, especially in Southern California.

We have seen a noticeable fall off in sales all for example, our 24-ounce sized packages in Southern California, which is consistent with the above. Although our sales of regular and low-carb Monster Energy Drinks increased, as did their respective market shares.

In fact, I'm proud to report that according to latest Nielsen's, Monster Energy and 16-ounce cans i.e. our Green Monster is now the highest selling item in the energy category in the United States. And our low-carb Monster Energy in 16-ounce cans is also now the best selling low carb or diet item in the energy category in the United States. This is a remarkable milestone that we've achieved in overtaking the leading Redbull item in the category.

According to AC Nielsen, for the 13 weeks ended June the 28, 2008 all outlets combined, convenience, grocery, drug and mass excluding Wal-Mart, the energy category as defined by Hansen Natural, grew by 13.7% over the comparable period in 2007.

Monster sales increased 42.5%, while its market share increased to 28.3% from 22.6% last year, and also increased from 26.9% at the end of the first quarter of 2008. Red Bull's sales increased by 11.3%, while its market share decreased to 35.7% from 36.5% last year and 37.3% at the end of the first quarter of 2008.

It is noteworthy that Rockstar sales decreased by 0.7 of a percent and its market share decreased to 10.8% from 12.4% in the previous year and from 11% at the end of the first quarter of 2008. Pepsi's Amp sales increased by 59.9%, primarily due to the introduction of new SKUs and expanded distribution. Amp's market share increased to 7.9% from 5.6% a year earlier.

However, Pepsi's No Fear and Adrenaline Rush brands both locked substantial market share and are now down to 1.8% and 1.4% market shares respectively.

Finally, Coke's Full Throttle brand sales decreased by 16% and its market share decreased to 4.8% from 6.5% last year. However, its NOS energy brand increased its market share to 2.6% from 1.1% last year, also largely due to new SKUs being introduced and expanded distribution.

I would like to refer to the growth rates on some of the individual items. What is important to us for example, in looking and assessing the strength of a brand is to look at for example the main or fledge of SKU. In the case of Monster 16-ounce Green Energy, the main brand grew 16% in convenience and gas and it sales point grew 6.7%.

When compared with the leading Red Bull 8 or 12-ounce sizes, the Red Bull 8-ounce size can product dropped sales dropped 14.6% versus last year and on a sales per point, also dropped 14.6%. Their 12-ounce pack dropped size can product dropped 8% in dollar sales and 19.6% on a sales per point basis.

The leading Rockstar products dropped... energy drink in 16-ounce cans dropped 11.3 percentage points versus last year and it sales on a sales per point basis dropped 7.4%. Amp, which has seen an increase in the sales for the brand however they are leading SKU, their flagship product drop... was up only 5.3 points in the sales and on a sales per point basis were down 2.3%.

Full Throttle, leading product is down 10.6% in sales and on a sale per point down 9.4. Even NOS, which is a brand which was up substantially on sale due to the increased distribution primarily is up at 134% increase in sales in aggregate, but on a sales per point dropped 20.7%.

When compared against admission against our competitors, you can see that the Monster Energy drink has continued to show positive growth both in sales and growth per point. And as we indicate earlier is now the leading item in the energy category.

Club store sales of energy drinks has generally been up around the county but California has seen a decrease in sales in percentages across all brands, certainly there also appears to have been a drop of in-sales in some of the independent stores in the U.S. again, particularly focused in California. So those non-measured channels appear to have been more severely impacted by economic conditions, particularly in California.

Sales of Java Monster represent approximately 10% of the total sales of the Monster brand, which is lower than about 16% that it represented in the first quarter. I will also point out that in the sales number that have been released, sales in the six-month period were negatively impacted by the buying at the end of 2007, ahead of the price increase and we estimate that was between up 3% to 4% of the total sales for the six-month period. I think that is probably... is that correct?

Unidentified Company Representative

I think it's a little bit more like 21 million over 280.

Rodney C. Sacks - Chairman and Chief Executive Officer

You just check that it is for the six months sales, six months period. I'll just get that confirmed, I apologize. Sales to retail grocery decreased from 8% to 7.2% and sales to club stores, drug chains and mass merchandisers decreased from 14.3% to 14.2%, or sales full service distributors increased from 73.1% to 73.8%. So sales through distributors decreased from 1.8% to 1.5% while other sales were flat.

International sales for the second quarter were nearly 6% compared to 4.8% last year. Gross sales outside of California increased from 72.8% last year to 76.5% this quarter. In the DST division, sales outside of California represent 81.1% of that divisional sales, up from 77.9% last year. Gross sales to customers outside of the United States increased from $13.4 million to $19.5 million.

In the first six months of 2008, we experienced increased cost of certain raw materials, principally apple juice concentrate, aluminum cans and sugar, which had a greater impact on the warehouse segment than the DST segment. Although dairy prices were lower, at the end of the quarter, we did start to see higher diary cost coming through. We believe that dairy cost will increase in the second half of the year, although we still believe that the gross profits that we are able to generate from our Java Monster product in the second half of the year will be higher than we were able to achieve during the last year.

We're also hopeful that apple juice concentrate prices will come down during the second half of this year. The figure I did give you earlier is correct for the impact on the volume.

Turning to the balance sheet, I pointed out that outstanding receivables stood at 28.4 days at June 30, down from 28.7 days in December and 33.9 days last year. Inventory was $123.2 million, up from $98.1 million at December. The increase in inventory is primarily attributable to increased raw materials and finished products of Monster and in particular Java Monster. And this was to ensure that we were able to meet demands during our peak selling season.

Average days of inventory was 82 days at June 30, 2008, which is higher than the 73 days of inventory at December 31, 2007 and 68 days at June 30, 2007.

We hold auction rate securities having a face value of $129.8 million at June 30, 2008. There were $207.5 million at March 31, 2008 that had experienced failed auctions. Additional redemptions amounting to $8.9 million were received by us in July. These securities continue to accrue interest at the contractual rights until their respective auctions either to succeed or they are redeemed.

Based on our availability to excess cash and other short term investments and our expected operating cash flows, we do not anticipate that the current lack of liquidity of these investments will have a material effect on our liquidity or working capital.

We're continuing to make progress internationally. Sales in the second quarter in the United Kingdom increased to some $1.9 million. Total losses attributable to the United Kingdom start-up operations were $2 million in the first quarter and about $3 million in the second quarter, due largely to FPs and event sponsorships incurred during the quarter.

We are continuing to secure additional listings for our product and as sales levels improve, the trading losses that we have incurred in the United Kingdom to date will be reduced. Obviously, the sponsorships were focused on the second quarter because that was the story to get into summer in the United Kingdom which has a short summer season and that's when we were focused on that.

These start up costs... basically, if when taken into account with respect to our results, had an impact of about $0.03 all together on our results, approximately $1 million in the first quarter... sorry, $0.01 in the first quarter and $0.02 in the second quarter.

So if one looks at our sales, our results on a percent basis, we believe that it should be factored in our results, these are one-off [ph] costs and obviously as we as we go forward we believe that we will achieve profitability reasonably quickly and then we will make up those costs. But for assessment proposes and other purposes, even those numbers should be taken into... factored into account.

We... subsequent to the end of the quarter, we commenced selling Monster Energy drinks in Sweden and Spain and we expect to commence sales of Monster Energy in Ireland in the next few weeks. We are continuing to make progress in South Africa, where we are securing additional listings and sales are increasing.

Our sales both in Canada and Mexico continue to improve and we are continuing to gain market share in both of these countries. On the Hansen Natural side, we are continuing with the roll out of our 40 beverages in 10.5 ounce sleek cans.

Gross sales for July were approximately $11.3 million some 20% higher than gross sales in July 2007. Sales of Monster and Java Monster in July were approximately 21.5% higher than last year. We are continuing to make progress in the on premise channel. The securing of the South West Airlines account was a great achievement for the company and we have now managed to secure the availability of Monster on a regional airline. We continue to see strong growth in the on premise channel with over 3000 accounts now selling Monster. Last quarter being the total number out there selling Monster to more than 14,000 on premise accounts.

We have seen the emergence of a small niche for energy shots in small size containers approximately 2 ounce sizes. These products are usually placed on check out counters in convenience stores and are very much an impulse purchase. As sales of these products have continued to increase, we decided to launch a Monster Hitman energy shooter in a 3 ounce size container which is a black container. We completed... have competed the formulation and the design of the product and anticipate launching Hitman later this quarter.

We are also planning to launch certain new additional lines of Monster energy products before the end of the year but it would be premature and not appropriate for us to divulge further details in this regard at this time. In conclusion I reiterate that we remained extremely excited by the strength of the energy category in the current economic environment.

We believe that the economy will stabilize in the near future and when consumer confidence is restored, the energy category will rebound and continue its growth trajectory ahead of that of traditional beverages and other categories which we believe will continue to reflect positively for the company.

We are continuing to evaluate other opportunities internationally and to place additional resources behind the expansion of Monster internationally. Additionally we are test marketing a new product non-carbonated enhanced water under the trade... brand name of Hydration in selected markets in Southern California and as and when we are able to measure the results of that brand in those channels, we'll consider rolling out the brand more widely and will keep investors updated with respect to the roll out at our interim conference call.

I will now open the floor to question.

Question And Answer

Operator

Thank you. [Operator Instructions]. We'll go first to Judy Hong with Goldman Sachs.

Judy Hong - Goldman Sachs

Hello everyone.

Rodney C. Sacks - Chairman and Chief Executive Officer

Hi Judy.

Judy Hong - Goldman Sachs

When I look at your sales number. For the quarter it was up 15.5%. When you gave us the April number on the last conference call it has been running up 29%. So it implies that the sales numbers still down pretty dramatically in May and June and then it sounds like a picked up to about 20% in July. So can you just walk us through what happened in May and June and then what we think is driving the improvement in July?

Rodney C. Sacks - Chairman and Chief Executive Officer

There was a slowdown in June, you were correct and there was a slowdown in May. So you didn't get the months right which was quite... quite substantial. It then picked up in June and it has picked up further in July. You know why the reason for that, I simply... we don't know.

Judy Hong - Goldman Sachs

Okay and then just sort of trying to again reconcile some of the Nielsen numbers that you have given us versus the gross sales number that you are reporting, it seems like disconnects seems to be getting bigger. It looks like in the Nielsen number shows 42% or something like that, it increased for Monster and again your gross sales numbers was much lower than that and that gap seems to be widening in more recent quarters. So do you have an explanation in terms of why do you think that the gap seems to be widening in the... in the Nielsen numbers versus what you're reporting?

Rodney C. Sacks - Chairman and Chief Executive Officer

We don't have an explanation. We've obviously noted that... that... that gap, the Nielsen numbers are an extrapolation of actual sales out of retail outlets. We obviously only... can only work on our sales numbers and shipments into our distributors, and from them, into... to retailers. They're all major channels. These are the measured chain channels. There is a large number of independent stores that... that basically starting to sell out product. They aren't measured by Nielsen.

There are also a number of... unmeasured channels, for example, the club stores, and we know that club stores which have traditionally been large purchasers of our products, and you know, and do have a substantial business in the energy drink sector, have clearly seen some falloff in their sales, nationally, although they are still up nationally. Generally that is our understanding, except for California. We understand club stores generally throughout California have all been severely impacted by the economic downturn and are all showing negative numbers for energy in California, and that is not only attributable to... to the best we were able to ascertain, not only to our brand, but also to the other brands that they stock.

It's a little more difficult for us. We were able to give information over here about our brand, but the... the club stores don't directly share the information with regard to the competitive brands, but as I've said, from what we've been able to glean from... from those chains, all of their brands are down similarly. So that is one of the... the reasons that we've seen a difference between Nielsen and our own sales numbers.

But other than that we did obviously believe that for a period of time there was quite extensive de-stocking going on throughout the U.S. just people putting in their belts and just making sure they had less inventories on hand. We would have thought expect to that to have worked through the system now and that is all we can say.

All we know is that we look at the numbers of Neilson which are measuring actual ring through but at the same time, they... it is an extrapolation from a selected number of sample of stores and we have no other... we're continuing to sell our products to the same distributors, to the same stores in the same way. But, that is the only explanation we can give. We measure ourselves through from Neilson but we always look our own sale but we all, as we've indicated, we're seeing a pick up in sales and when you look at the sales of Monster within the company they are north of 20%. So you know that's the only explanation we can give to you on in that regard.

Judy Hong - Goldman Sachs

Okay, and then if I look at your operating expenses as a percent of sale it looks like it declined pretty substantially from the first quarter even though you've started to incur even more startup cost in Europe. So can you just explain some of the factors that drove the sequential decline from first quarter to second quarter in terms of the SG&A expenses?

Rodney C. Sacks - Chairman and Chief Executive Officer

I think a part of that was driven by you have to back out the, that is only cost relating to distributed terminations and, the legal fees et cetera. And I think that had an impact, I don't think that on a sequential basis we would have, if you take that impact out that there would be a substantial decline.

Judy Hong - Goldman Sachs

Okay, last question on Java you said the mixed decline sequentially to 10%. Can you talk about the competitive landscape obviously you've seen more products coming to the marketplace. What's happening from a competitive standpoint and Java's ability to get more shelf basis?

Rodney C. Sacks - Chairman and Chief Executive Officer

So I just got back before just to the other question, I'm just looking at some of those numbers now for first quarter on, if you take some of those other numbers out. And basically we are not seeing a decline sequentially either in distribution or all the SG&A and payroll are all basically up, inline with increased sales and increased marketing. So I think that effected just because of that you got to backup those other extraordinary expenses.

Judy Hong - Goldman Sachs

If I look at numbers in the first quarter your operating expenses up 57%. You back out those numbers and it looks like this quarter was up close to 25%?

Rodney C. Sacks - Chairman and Chief Executive Officer

But then you pricing that also previous year.

Judy Hong - Goldman Sachs

Right.

Rodney C. Sacks - Chairman and Chief Executive Officer

That I cannot tell you, I cannot tell you why the difference was but I mean it's I cannot answer that question for you sitting here. Sorry. Your other questions Judy?

Judy Hong - Goldman Sachs

On Java and what's happening to the competitors landscape and?

Rodney C. Sacks - Chairman and Chief Executive Officer

We are just seeing that there has been a lot of other brands that have jumped into the market and what we do seem to be seeing is sort of a [indiscernible] slowing down in consumer demand for the energy plus coffee sort of category. The actual category is continuing to grow. We are seeing the actual coffee category growing at quite a healthy rate according to the Nielson for coffee. But there is a there is a lot of more competition and obviously we are also able to increase Monster more so as a percentage we just seeing a moderation there and we think that may continue going forward.

Judy Hong - Goldman Sachs

Okay.

Rodney C. Sacks - Chairman and Chief Executive Officer

Okay.

Operator

Our next question is from Kaumil Gajrawala with UBS

Kaumil Gajrawala - UBS

Hi, thank you.

Rodney C. Sacks - Chairman and Chief Executive Officer

Hi.

Kaumil Gajrawala - UBS

First question if you can gives an update on promotional activity including... internal activity to the degree in Southern California then what it was like national?

Rodney C. Sacks - Chairman and Chief Executive Officer

Promotional activity we did at the end of last quarter approximately we saw that the whole category in California I had was down a couple of points so, we obviously took steps to look at the market to see what was happening and we did address the market through promotions and through more focused activity on our earn sales and distributors efforts in the market.

But other than that we've not particularly end mode [ph] promotional activity in California in preference to anywhere else. Most of all, promotional activity costs already related to the shelf programs that we've been introduced across the country to order to secure shelf space for our products and as well as sponsorships endorsements etcetera those cost similarly or simply in a determined by athletes and events wherever they may take place.

So there is no geographic limitation. Sponsorships have gone up cost of actually securing a sponsorship and athletes have increased what I refer to that on previous occasions that the cost of doing business with athletes in that extreme sports fight has gone up. But we all continuing to obviously use that as our promotion.

We obviously looked at spending money in that area with the sort of little fall of that we've experienced in the energy category and beverage sales in general. That line of customers to as a percentage little higher than we had initially budgeted for. But we were committed obviously to a lot of the marketing and the promotional steps for the year which we believe was it was so important for us to continue with both from a brand point of view and from a competitive point of view.

We're looking at the competitive landscapes. So they are pretty much inline with where we're what we have planned. Where the cost had increased in that item were the sponsorships of events and athletes in the United Kingdom. Will did have reply quite of big role in the, in our actual consolidated sponsorship line item which did increase. And so if you back that are those cost out which are extraordinary to the US operations and they are more inline with what we had anticipated.

Kaumil Gajrawala - UBS

Okay. And just to as there we think of the back half year, given the starting [ph] these that you spend when you are first rolling out jobs on incremental starting is enough spending [inaudible] base to reconsider it by now versus what is looking back in the first half of year?

Rodney C. Sacks - Chairman and Chief Executive Officer

Change you minds.

Kaumil Gajrawala - UBS

give a sense.

Rodney C. Sacks - Chairman and Chief Executive Officer

I think that which will be pretty much continue on the level we have seen them now in this quarter.

Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary

This really affects the net sales.

Rodney C. Sacks - Chairman and Chief Executive Officer

Yeah.

Kaumil Gajrawala - UBS

And last question on inventories I think they are barely steadily been increasing, is it preparation of a roll out into these international markets or is it that the macro situation in?

Rodney C. Sacks - Chairman and Chief Executive Officer

I think it's been a macro situation. We did obviously have some build up of inventories both here and overseas for the U.K. launch in order to assure we have products. So we ran some production as well. We also didn't want to be faced with an out of stock situation which although we didn't know we had sort of paid it, it could have bumped with just as it happened it leveled off.

But that because the reason there is limited production and there is a longer lead time to get that production we decided to build up the inventory rather to insure that we had inventories, depending on where the sales went. So we did that we have the inventory and we are now sort of working down through it it's its fine there's no problem with it, its good inventory and we are just work ourselves through it and adjust ourselves going into second half of the year.

Kaumil Gajrawala - UBS

Okay thank you very much.

Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary

Thank you.

Operator

Over to next Mark Astrachan with Stifel Nicolaus.

Mark Astrachan - Stifel Nicolaus

Good afternoon, guys.

Rodney C. Sacks - Chairman and Chief Executive Officer

Good afternoon, Mark.

Mark Astrachan - Stifel Nicolaus

First question just relating to your views on brand equity and pricing. I know we talked about this in the past, but given this success of the Monster brand and the equity it enjoys in category, have you given more thought to taking pricing at year end not necessarily to the same degrees as you did at the prior end but basically in line with some of the concentrate producers do outside the energy category, simply because it can do it, because you enjoy brand equity?

Rodney C. Sacks - Chairman and Chief Executive Officer

We are really not looked to in that sense, we think that it's still premature for us. [Indiscernible] something we can introduce reasonably quickly if we feel that that's justified. We think we need to wait a few more months just see the general direction of where the economy is going.

We obviously anticipate pricing going up in things like raw materials, cans, and then sugar and possibly in dairy a little bit. But we think we need to get a better handle on the extent of that and what impact will have on us before we increase process. I think that is something that is on our mind.

That is definitely on the agenda would be a convenient time to do it at the end of the year. But we haven't made up our mind completely as to whether we will and if so to what extend.

Mark Astrachan - Stifel Nicolaus

Great. And then in terms of thinking about the cost environment, you have done a pretty good job of managing those costs particularly on the DST side of the business are there anything, any inputs there that are particularly concerning or anything that may change a bit more than we've seen in the past towards is it kind of steady as you go there?

Rodney C. Sacks - Chairman and Chief Executive Officer

No. I think that early news that inline with everybody would wait and see what happens to world aluminum process that might have an impact on can process going forward.

Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary

Sugar.

Rodney C. Sacks - Chairman and Chief Executive Officer

Sugar as well but I think the main things is really more can process where we're not sure we all as we said we are expecting some increase in the dairy component of Java but we don't believe that it will be anywhere near what we had last year. But we'll have to pay that... show me that fluctuates from month to month.

Mark Astrachan - Stifel Nicolaus

Great. And then in terms of your usages of cash you spent about 50 million to buyback stock in quarter. One is, should we expect that sort of trend to continue going through the balance of the year and then secondly have you given any thought to doing other things with your cash positions like special dividends or anything else like that?

Rodney C. Sacks - Chairman and Chief Executive Officer

We think that in fact, we believe that if anything we should be buying back our stock with the cash. Certainly to leave constrain as to when we can buy stock and we are pretty sensitive to having any sort of information of a creative or any nature that might be, have any perception of additional specialist knowledge and certainly [Ph] to that we do believe and or taken decision to back our stock quite aggressively but again that will be subject to legal advises to when we are in the position to do so and we propose to do so particularly at these gross levels

Mark Astrachan - Stifel Nicolaus

And will that include potentially extending any share re purchase commitment?

Rodney C. Sacks - Chairman and Chief Executive Officer

I can't speak for the Board but yes, it's my personal give yes it would.

Mark Astrachan - Stifel Nicolaus

Well that's good to hear and then just a final question on comparisons with the third quarter on a month by month basis. Am I correct in remembering that the quarter gets easier as we go in particular I think September comparisons from last year were troubling. There was some slow down in trends there so it should be getting easier as we go through the quarter?

Rodney C. Sacks - Chairman and Chief Executive Officer

I don't know. Pretty much you would... maybe able to expect later, it would maybe logical. We are still facing an economy where there is lot of uncertainty and there is an impact clearly on the buying patterns of consumers. I think we're continuing to see more and more retail and other customer valves coming through with showing reductions in foot traffic and reductions in purchases.

And so we just don't know what impact that will ultimately have. Obviously we also continue to ramp up then we have the additional job at Monster sales that took place last year, while we were securing distribution. So that was pretty erratic because we introduced it we sort of had some availability issues and so sales drop then we are able to more supply then sales reduced.

I don't in which months I don't know sitting here what that match was but that will play a part in our numbers going forward. But we feel we are starting to settle down and we are seeing some increased back in our own sales numbers and we think that as the economy sort of just stabilizes and people lose the shell shock of the higher gas prices and things that definitely help.

That obviously doesn't answer the weakness the macro economy but from a gas price point of view we think that things will start settling down a little bit as people get more used to these prices that are just going to probably become a way of life for us.

Mark Astrachan - Stifel Nicolaus

Okay. Thanks Guys.

Rodney C. Sacks - Chairman and Chief Executive Officer

Thank you.

Operator

We'll go next to Greg Badiskanian with Citigroup.

Gregory Badiskanian - Citigroup

Great, thanks. I just have a few quick questions. Can you maybe talk a little bit about how the core Monster product is doing X job in more mature markets? You mentioned California slowdown, are there some other markets that you'd look at, to kind of... kind of look at that growth, and do you have some numbers around that? I didn't mean to put you on the spot if you or just maybe just sort of anecdotally if you can, directionally tell us?

Rodney C. Sacks - Chairman and Chief Executive Officer

Well, anecdotally according to Nielson, basically we're saying that if you take Java out of the mix, the didn't take it out of the category growth. For example, convenience and gas, we off sold Monster without Java its still increased sales, is substantially higher than the category growth.

Gregory Badiskanian - Citigroup

Great.

Rodney C. Sacks - Chairman and Chief Executive Officer

Both in excel sales and in sales per point. So the brands on it's own, it's clearly still ahead of the category, and still substantially ahead of basically of all the major competitors, it's substantially ahead of rock stars, red bull sales and rock star which in fact negative. If you take their job out of their products as well. So we are continuing to see solid sales in the core brand and that's what I referred to anyone the real ultimate cool product is your original work horse your flagship, Monster Green Energy 16 Ounce, single serve, and that is now the leading item in the energy category. And that's continuing to grow both in actual dollars and in sales... in dollar sales per point.

Gregory Badiskanian - Citigroup

I'm sorry, I missed the first part of the call. Did you give numbers around that?

Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary

Yes. Yes. We did..

Gregory Badiskanian - Citigroup

Okay, I'll listen to... I'll read the transcript.

Rodney C. Sacks - Chairman and Chief Executive Officer

Jus to give you the one marker, I just have to pick out the Los Angles market, you can take Monster without in the 13 weeks ended June 28 you take Monster without Java Monster we were positive in that market both in actual sales and in sales per point.

Gregory Badiskanian - Citigroup

Okay. So it's positive--

Rodney C. Sacks - Chairman and Chief Executive Officer

This was compared to red bull which was zero which reflects and rock star which was down on both those areas, both those criteria.

Gregory Badiskanian - Citigroup

Right. And when you look at... you had mentioned that in terms of Java, can you remind me in terms of just the comparisons because you are ramping you very nice incremental sales growth last year from Java, when do you start to say its still bit tougher compares where Java was kind of... out there at full force at retail?

Rodney C. Sacks - Chairman and Chief Executive Officer

I think that we've still got a lot of work to do to get the additional SHUs for which we have a secured lot of shelf space in many types of that should have been implemented. We've seen reasonably good execution in the private, we've not yet seen really a full distribution of the Java Monster SKUs when you look at the actual your Java Monster SKUs on basically in the Nielsen number they drop up into the pretty much into the 20's very quickly.

Gregory Badiskanian - Citigroup

Yes.

Rodney C. Sacks - Chairman and Chief Executive Officer

And so we see, although we have rolled it out and we've seen a sort of stable handling of Java we think that with some focus we should be able to get the distributions levels of these newer product up to plus 50 which will have a positive impact. But as regards last year, Java by the time we have got to about August we started to get to sales. July, August pretty much that we're closer to where we are achieving sales now.

Gregory Badiskanian - Citigroup

Okay.

Rodney C. Sacks - Chairman and Chief Executive Officer

So that follow to get... there were some quite erratic in there was just a drop about in November and then it picked up again in December which were higher. So you... but if you take a sort of a moving average. It was much closer to where we are seeing, the average just now we are seeing some increase on it. But it is closer to where we are.

Gregory Badiskanian - Citigroup

Okay, alright. That's helpful. And then also just we would respect to your moderating sales growth which is still obviously doing a great job relative to the category. I mean we talk about it's a tough economy is that trading down and how much of its to may be just the category maturing, just when you look at the over all industry that to find out very significantly as well lately?

Rodney C. Sacks - Chairman and Chief Executive Officer

Yes we think that overall industry growth and lot of that we believe has is due to the macro environment. It's just been a sort of a regulate stud on as the environment is getting tougher and we see that should be more morphed in California where we perceive that the effect of the slow down has been more marked on consumers, on construction, on property and mortgage, it's just everything that hit California particularly Blue collar workers and which is a large part of our consumer.

They're being hit more, they are going into the stores as much, they are not out there in convenient stores. So foot traffic and purchases particularly of our higher cost item is clearly impacted. By that and ultimately the pendulum does swing eventually and it turns so we believe that when that happens the energy category is stalled.

We think one of the exciting categories of the beverage industry. And we think that this will be category that will rebound more quickly than the other traditional categories which has been flattened and we're decreasing before the environment started this for example the coordinated products.

Gregory Badiskanian - Citigroup

California may be a tough example to speak of that's all see your more mature markets you have two factors impacting it. May be another market that's where the economy is doing a little better and it's more mature but that might be helpful. At some point just to kind of get some info from you there and the moving over to Hitman, can you talk a little bit about that on emerging category the energy shock category and can I have that product is position and what the opportunity is, do you think it will be incremental sells will be cannibalization and may talked about that?

Rodney C. Sacks - Chairman and Chief Executive Officer

I think everybody competes for a share of stomach and that is an energy when I say that it is easy more traditional beverage. But in the energy category again you're getting consumers who are looking for an energy boost and then they will all clearly a percentage of consumers who whatever is an on, that first year, say will I need the energy boost but I don't necessarily need the liquid with it.

And there are obviously becoming the consumers who are gyrating towards the energy shots. So at all, there is some cannibalization, there is competition, it must obviously take from the categories so when we really look at the category, we believe the correct way to look at it is as one large category, and energy shots all simply part of that category. Just as we saw 8 ounce energy drinks and we're now selling 24 or 32 ounces, this is just going the other way.

So but we do see that category growing, it's an impulse purchase. Until now it's really been a little box on a sitting on the shelf of the convenient stores, we have seen convenient stores starting to design and change starting to design a racks to actually put because there are more competitors coming into the category that I have seen the product it is a high range for the convenient stores. So they are making good margin on it, so we see them designing racks and things where they can actually offer a selection of these products. They usually are sold bore doesn't necessarily mean that couldn't be somewhere getting him into the culture but they don't necessarily need to be because it is a small volume.

We think it will remain a niche within the energy category. But it will be part of it and if it's part of it you know we don't see any reason why we shouldn't be playing in that category and be a part for that reason we took the decision. We sort of saw and wanted it to mature it to a sufficiently high level to justify the costs and focus of launching products and putting efforts and manpower behind it.

We took the decision to enter that category and which we've done and we've designed the product. We have decided to go a little bit differently, we decided to increase the size to a three ounce serving. It's still a short, we call it a shoot out and basically we are going to roll that out pretty quickly. We think that will be incremental; it may be marginally... there will be some canalization but we think that it's at a good margin for us and it shouldn't result in a margin reduction.

Unidentified Analyst

The equal margin do you have products to stay?

Rodney C. Sacks - Chairman and Chief Executive Officer

It's an at least equal to our basically is equal to the maid amongst the lions. Yeah.

Unidentified Analyst

Great we will look forward to seeing that in the stores. Thanks.

Rodney C. Sacks - Chairman and Chief Executive Officer

Thank you.

Operator

We go next to Alex Paterson with RCM.

Alex Paterson - RCM

Hey thanks for taking my question.

Rodney C. Sacks - Chairman and Chief Executive Officer

Sure.

Alex Paterson - RCM

Rodney, I was just curious in getting back to the question Judy was asking about. Try and understand the dynamics between what is seen in retail numbers and what seems to be going on at the shipment level and the fact that the retailers and distributors are clearly under pressure, probably trying to work their working capital. They are more efficiently inventory down etcetera. Are you getting...do you have a dialogue with AB or any of the other larger distributors that provides you some feed back on maybe these stocking trends or anything to that effect?

Rodney C. Sacks - Chairman and Chief Executive Officer

We do have dialogs when we have talk with them but we've not been able to discern with any level of confidence what the reason is for the disconnect. We're knowing that they've been able to look to that has really pinpointed it and given us a comfort level to say okay we know what its I an if it is addressable in any way how we address that. We just basically a school fee the explanations of being destalking. explanations of that times are tough but we're not seeing any other reason for it and we just as I indicated we're very strong to coal [ph] we just don't know the difference or the reason for it. I mean we just we get the information, we have our own sales figures and what we're trying to put in together and may there is just a connected at the moment.

Alex Paterson - RCM

Understood I guess the key point there was a de-stocking can be short-term issue versus something that is clearly not. I gather at this point you just can't explain whether it is a short term issue or not?

Rodney C. Sacks - Chairman and Chief Executive Officer

No, just de-stocking technically should be shorter but it does take time. But we don't know whether that is the only explanation or what the reason is. Bit as of it what we have noticed is the larger purchases and the purchases coming out of say, club stores just selling full packs. They have clearly been a slowdown in that area.

Alex Paterson - RCM

Yeah, understood. So, just quickly there is couple of other things. The on premise you talked about as a percent of sales did you give that number...

Rodney C. Sacks - Chairman and Chief Executive Officer

I didn't give a number for on premises as a percent of sales, no.

Alex Paterson - RCM

Is it material or is it getting anywhere?

Rodney C. Sacks - Chairman and Chief Executive Officer

From a [indiscernible] perspective it's starting to get material but from a sales perspective it is still very small and that's a very still an expensive part of our business in order to achieve to get that business there are a lot of rebates, there're a lot of deals to basically lot of costs to get into that business. But I can't give you a figure of it. I don't have it handy on what we're selling there. But it's not material to the point that it will justify us breaking that out already starting to analyze that at this point.

Alex Paterson - RCM

Okay. The fourth quarter, when you have this... sorry--?

Rodney C. Sacks - Chairman and Chief Executive Officer

I missed out a factor that is an important factor is that we all are making headway, it is slow but it is getting out before have to been able to get to the level of 14,000 accounts with indebt with that debt clearly just hitting in a wrong direction and then it's pretty moving ahead with some momentum.

Hilton H. Schlosberg - Vice Chairman, President, Chief Financial Officer, Chief Operating Officer and Secretary

nconsistent and part from them would go challenge green

Alex Paterson - RCM

Understood, understood it's a build up process. The fourth quarter when you had a ship in of before the price increase, obviously that creates an artificially tough comparison and it's not clear that everybody has digested that notion. Is that a fair assessment of how we should look at the fourth quarter?

Rodney C. Sacks - Chairman and Chief Executive Officer

I don't think so. If your looking at comparisons, I think that you have really got to take the estimate of $20 odd million, $21 million we thought of in our off sales and it may have an impact a little more than that the deficit our base kits and actually when you factor that into just generally in the sales for the first six months that would be a fairer way to do it and we agree with it.

Alex Paterson - RCM

Okay and you mentioned a... maybe you'd have an analyst day one of these days getting ready for that?

Rodney C. Sacks - Chairman and Chief Executive Officer

We probably will do an analyst day probably the idea would be to probably do that towards the end of the year that's where we are planning to probably do something in early December mid December going back to New York and actually have a reasonably extensive day. We are all planning to continue the midst, quarterly updates and we have got it we are going to try and time those updates, at a time when we're able to also have these proceeds to the most recent Nielsen numbers.

There was unfortunately the last time that happened we had the shelled meeting that we still felt obliged to have that update because we had indicated that to share holders and investors and but obviously it did not fall when I blast to do that that is why one of the reasons we would, have up to date, or more up to date. Nielsen numbers than we had already discussed at the shareholder meeting but going forward, mid theory of cold for the this kind of quarter we have to be in a position to be able to give an up-date on new sort of sea packs where the sales are going and where the economy is going

Alex Paterson - RCM

Okay and lastly I maybe... I know you do not talk about projections but so the degree you have seen or read or heard any major industry players or consultants regarding the front LRB market and energy drink grilled with in it, in these current economic times. Have you picked up any sort of commentary about expected growth rates for the category over the next few years?

Rodney C. Sacks - Chairman and Chief Executive Officer

No, no. The last we have talked, what is really been impacting every body is the uncertainty of how the general economy has been affecting energy drinks perhaps might be a little disproportionately to other drinks and so we have seen it flow down that is perhaps been greater than one would have anticipated but we believe that that will also reverse at that same pace but just talking to people, they're very much in the air. They simply don't know they still think that this is the growth category in the whole beverage industry.

Even more than it haunts waters and we have the focus is on those two categories and that categories also slow dramatically I think the numbers that seem to have been published about that category and the bottom water resource sales that drop off has been even more amount than we have seen the energy category and just coming those higher price more sort of newer lines that we had to many this growth and they seem to be the drop of.

But we thing that well stabilize and people are going to get back to looking to what is new, what is different, what is exciting, what is summing that motivate them to buy the beverage and believe that it's kind a pick up again and focus again on the energy category because we believe that is still the category that provides some new alternatives some in new, some in different and as product that performs to consumers.

Alex Paterson - RCM

Okay thanks very much for the time Ron..

Rodney C. Sacks - Chairman and Chief Executive Officer

Pleasure thanks, Alex.

Operator

And your last question is from Judy Hong with Goldman Sachs.

Judy Hong - Goldman Sachs

Just following up the question about what is the long term outlook for the energy drink category and to the extent that we are in you know long period of consumer weakness in the US and the category really dozen pick up any time soon how much flexibility what is your willingness in terms of thinking about some of the suspending you know weather its sponsorship expenses or brand investment that you are you budgeting or you are thinking about doing at this point.

Rodney C. Sacks - Chairman and Chief Executive Officer

We are looking at that pretty closely we are looking at it literally on weekly basis we are looking at the discretionary spend because we do have historically been opportunistic in... we have about and we said, but we see a really good opportunity at a reasonable cost. We often have taken that opportunity and jumped on it very quickly, because that's been just the way we've started how we've done the business. And we're trying to introduce a little more constraint there because we think some of these deals aren't good, because again you can't go out and just spend and spend. At the same time, you don't want to end up starving your brand. We're building the brand for the long-term, the company for the long-term. And we don't want to be able to give up sometimes good properties or good athletes, and let them get... allow them to go by default to competitors, because we think that we will regret the day when it comes, next year when somebody else's got the rights to a particular event that we let past this year, that we couldn't get next year.

That being said, we are looking very carefully at our sponsorships, we're looking at trimming maybe areas that are peripheral to the direct core groups that we are at, we're perhaps we were trying to extend the brand and obviously extend the consumer base, where we feel that there is some uncertainty as to the real payback in that area, we obviously those ones we will pull back.

We will obviously be cautious about our sales, or as you can see, it ultimately in dollar terms the sales are continuing to increase and we obviously continue to... we need to continue to support the brand. But we will try and continue to marry our cost much more closely to our revenues. As we've indicated, the problem is sometimes that's a lot of these programs are basically are annual programs and you buy them and sign off on them yearly in advance and so the reaction time can't be quite as quickly. But we have already, I don't want to go into the detail of which one it is, but there is a particular program we have an option next year to extend it, and we... which was quite a high dollar amount, and we decided to put... we paused on it.

So we will do that as we continue to go ahead and manage the brand, but we again I reiterate that we're not going to pull back, that's the wrong message on just virtuously [ph] on spending, we think that's a short term solution and not a long-term solution for the brand. On the other hand, we are trying to be responsible about it and not simply saying we are developing a brand at all costs and simply ignoring the bottom line, but we are trying to create a balance between the two.

Judy Hong - Goldman Sachs

Okay. And then just a clarification, you talked about the soda cost in Europe. But any dilution in the first quarter $0.02 dilution in the second quarter. Are you basically saying we are pretty much done with those expenses or those losses?

Rodney C. Sacks - Chairman and Chief Executive Officer

I am not sure. I wouldn't... I think that the third quarter may see... maybe a small also coming from there. We are starting to see a lot of good listings, we are actually getting listings for the some of the big retailers, both in the grocery section, in the what they the call, the gas station section and in some of the independents. And we all starting to make some headway. But a lot of those listings are coming in the third quarter and are coming later in the year. So I am not sure what impact that sales will have. The result is we are... because we believe that marketing and promotional spend will be lower in the third quarter because a lot of the programs were took place and occurred in the second quarter, but there still will be some I think some loss coming through from the UK in the second quarter... third quarter, sorry.

It will be helped by some of the sales that are now going through to distributors in Sweden, Spain and hopefully before the end of the quarter, we think Ireland as well. That will help us, but it maybe it will be reduced but it may be smaller. But certainly if I think by the fourth quarter we will hope to get into a more stable position in Europe.

Judy Hong - Goldman Sachs

Thank you.

Rodney C. Sacks - Chairman and Chief Executive Officer

Thank you.

Operator

Ladies and gentlemen, this will conclude today's question-and-answer session. I would like to turn the conference back to Mr. Sacks for any additional closing remarks.

Rodney C. Sacks - Chairman and Chief Executive Officer

Thank you. Just in closing, I just want to thank everybody for attending the call. This is... we are trading in difficult times. I think many people don't quite appreciate the extent I think of the difficulties that are facing the U.S. economy. We really do dissect a lot of the consumer product companies' results, I mean you focus on their North American divisions or businesses. Invariably, they are all negative and down.

So, we believe that the achievement we've managed to achieve at this stage is very good. We are very happy with that, we are taking the steps to expand internationally. We have a number of other prospective countries in mind. We are going through and taking on the necessary stock to help support that expansion now. Rome wasn't built in a day. We believe we'll get there. We are looking at other ways to secure stronger distribution partners overseas.

And you know the main message I want to give to investors is that our brand is really healthy, it's really strong. Despite all of this, we are continuing to take market share. We are now the leading brand in certain of our SKUs which is unbelievable and unbelievable achievement we think for the company.

And we are continuing to grow, we are exciting new products on the drawing board. And so we've just believe in the long-term that our company and brand will continue to prosper and lead the growth in the energy category. And I just thank everybody for the support and we'll give everyone a further update when we have our interim conference call. Thank you very much.

Operator

Ladies and gentlemen, that does conclude today's teleconference. We appreciate your participation and you may disconnect at this time.

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EXHIBIT 16

From: Joe.Cianfrani [mailto:jcianfrani@kmob.com]
Sent: Monday, March 17, 2008 2:01 PM
To: Alan Gocha
Subject: RE: Complaint against 6HE

Alan, thank you for the complaint. Per our discussion on Friday, attached is Hansen's complaint against N2G Distributing and Alpha Performance Labs that was filed on Friday. I will let you know about any developments in the case.

Joe Cianfrani

From: Alan Gocha [mailto:alan@fivehour.com]
Sent: Friday, March 14, 2008 3:28 PM
To: Joe.Cianfrani
Subject: Complaint against 6HE

Joe, per our telephone conversation today, attached is a copy of the complaint Innovation Ventures, LLC (d/b/a Living Essentials) filed against the maker and distributor of 6 Hour Energy. When you get a copy of the complaint you filed back from the court, I would appreciate receiving a copy.

It was nice talking with you. I'll try to give you a call next week to check in and to let you know how our case is progressing.

Have a great weekend.

Regards,

Alan

"<KMOB.COM>" made the following annotations.

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LIVING ESSENTIALS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Plaintiff,

v.

INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation,

Defendant.

Case No. 08-cv-1166 IEG (POR)

DECLARATION OF GAIL B. MAHADY Ph.D. IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date: September 15, 2008
Time: 10:30 a.m.
Courtroom.: 1, Fourth Floor
Judge: Irma E. Gonzalez

Date Filed: 07/01/08

I, Gail B. Mahady, Ph.D. declare:

1. I have been an Associate Professor at the University of Illinois at Chicago continuously since 2007, and was previously Assistant Professor at the same institution from 2000-2007. My curriculum vitae are attached as Exhibit A.

2. I have a BSc. Pharmacy degree from Dalhousie University and a Ph.D. in Pharmacognosy from the University of Illinois at Chicago in 1991. I am a recognized expert in the fields of dietary supplements, traditional medicines and natural products. I am familiar with the ingredients of and the claims made by Living Essentials for its 5-hour ENERGY® product.

Response to paragraphs 3-6 of the Davis declaration:

3. These comments are made in response to Dr. Davis' comments concerning the claims made by Living Essentials for its 5-hour ENERGY® product, a 2 oz. "energy shot" that provides five hours of energy within minutes after ingestion. Living Essentials' advertising claims, are based on an independent, clinical study sponsored by Living Essentials (The "Blum clinical trial[1]"), and which Hansen has cited in their complaint, and data from the scientific literature. I have thoroughly reviewed the Blum clinical trial. Results of the Blum clinical trial show that the majority of subjects involved reported sustained energy for 4.92 (range 4.7 to 5.1) hours after ingestion of 5-hour ENERGY®. Thus, the clinical data clearly show that the product provides five hours of energy, as Living Essentials advertises. Hansen provides no data or evidence to contradict these clinical data, nor do they provide any clinical evidence to the contrary. In addition, it appears that Dr. Davis does not have a copy of this clinical trial, thus his comments about the study were made with having thoroughly reviewed the trial. Furthermore, based on the published scientific and medical literature as described below, the accepted principles of biochemistry, pharmacology and

[1] Blum JM. A randomized, 3-arm comparative-controlled, double-blinded, cross over group, clinical trial to test short term efficacy and safety of Living Essentials' 5-hour energy drink in comparison with other energy drinks. Final Report, May 11, 2007.

physiology support the clinical data and the claims made by Living Essentials concerning their product 5-hour ENERGY®.

Response to paragraph 7 of the Davis declaration:

4. These comments are made in response to Dr. Davis' explanation of energy. There are numerous definitions of energy, as there are many different forms of energy including kinetic, potential, thermal, gravitational, sound energy, light energy, elastic, electromagnetic, chemical, nuclear, and mass. One of the most famous of course being the definition of energy by Albert Einstein in his mass-energy equivalence, $E = mc^2$. However, the definition of energy is extremely broad and includes: 1. The power by which anything acts effectively to move or change other things or accomplish any result. 2. Habitual tendency to and readiness for effective action. 3. Power in active exercise; force in operation. 4. Physics: The capacity of doing work and overcoming inertia, as by heat, light, radiation or mechanical and chemical forces.[2] In fact there are hundreds of definitions of energy on the worldwide web including: (physics) a thermodynamic quantity equivalent to the capacity of a physical system to do work; the units of energy are joules or ergs; forceful exertion; "he plays tennis with great energy"; enterprising or ambitious drive; "Europeans often laugh at American energy" an imaginative lively style (especially style of writing); "his writing conveys great energy"; "a remarkable muscularity of style" a healthy capacity for vigorous activity; "jogging works off my excess energy"; "he seemed full of vim and vigor" any source of usable power.[3] Thus, the definition Davis provided in the declaration is extremely narrow and limited.

[2] Funk and Wagnalls New International Dictionary of the English Language, Comprehensive Millennium Edition, Ferguson Publishing, 2005.

[3] wordnet.princeton.edu/perl/webwn, accessed Agust 29th, 2008.

Response to paragraph 8-14 of the Davis declaration:

5. These comments are made in response to Dr. Davis's comments on calories and energy, as well as to the assertion that only calories can produce mental and physical energy in the body. Energy may be produced from calories in the human body through the processes of digestion, absorption, metabolism and storage. These processes absolutely require numerous enzymes, co-factors, vitamins, and minerals to covert calories into forms of energy that the body can utilize. It is also well understood that the brain does require a level of glucose to function properly. However, it is also well recognized in the medical literature there are numerous drugs that act as stimulants in the body. As an example, amphetamines are chemical stimulants that provide no calories. Yet, they decrease the subjective feelings of fatigue, confusion and depression, while enhancing feelings of vigor.[4] Amphetamine, and related drugs such as methamphetamine are a group of drugs that act by increasing levels of norepinephrine, serotonin, and dopamine in the brain, which corresponds to the central hypothesis of fatigue, describe below. Amphetamine, a potent sympathomimetic drug, increases energy levels, concentration, and motivation by binding to the monoamine transporters and increasing extracellular levels of the biogenic amines dopamine, norepinephrine (noradrenaline) and serotonin. This, in turn, causes cortical stimulation and possibly stimulation of the reticular activating system, thereby stimulating the central nervous system.[5]

6. In addition to amphetamines, there are many other pharmaceutical drugs and naturally chemical occurring substances such as epinephrine, cocaine etc., that have various levels of stimulant effects on the body (both mental and physical enhancement). One such substance is caffeine. An entire book published by the Institute of Medicine that has thoroughly reviewed the performance enhancing (both mental and physical performance) capabilities of caffeine.[6] This book was written by a Committee of Experts in the field of caffeine research and was written based on

[4] Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001, pp. 14.

expert opinion. Thus, the concept of calories being the only source of enhancing mental and physical energy in the body is incorrect, as many drugs and chemicals can stimulate both mental and physical functions by acting centrally in the brain, these are aptly described in numerous pharmaceutical and medical texts, as well as thousands of scientific and medical journal publications.

Response to paragraphs 15-23 Living Essentials' Clinical Trial :

7. These comments are in response to Dr. Davis' declaration concerning the following 5-hour ENERGY® claims on its label:

"Hours of energy now"
"No crash later"
"Feel it in minutes ‑ Lasts for hours"
"Sugar free"
"Only 4 calories"
"0 net carbs"

8. In my opinion, Living Essentials advertising claims are supported by the Blum clinical trial and by previously published medical and scientific literature. The Blum clinical trial of 5-hour ENERGY® was performed by Dr. James Blum, who is an Epidemiologist and Biostatistician, at the University of New England Medical School. The clinical site was located at the Southern Maine Research Center (independent medical research center) located at 344 Cumberland Street, Westbrook, Maine. Approval to perform this study was obtained from the Institutional Review Board of the University of New England Medical School. The study was a prospective, randomized, double-blind, 3 armed comparative-product clinical trial involving subjects who were wishing to use these products for short term energy. The study subjects were recruited and had their weight, height, blood pressure, pulse and blood glucose measured. Subjects had a blood draw for comprehensive metabolic profile and females of child-bearing age were tested

[5] Goodman and Gilman's The Pharmacological basis of therapeutics. 9th edition, McGraw Hill, New York, 1996.
[6] Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.

for pregnancy (which was an exclusion criteria). The study has a two-day baseline run-in to establish normal patterns of diet and exercise. On testing days the subjects were randomized, with each subject having an equal chance of receiving either one of three energy drinks (5-hour ENERGY®, Monster® or Red Bull®) as their test beverage. On test days the subjects had breakfast upon waking, went to the clinic for their test dose of energy drink and then continued on with their day until they came back to the clinic at noon for further tests (exercise, cognition testing). Later in the afternoon the subjects returned to the clinic to report on their experiences to research staff. The primary endpoints of this study included staff measurements and self-reporting of energy levels and strength, duration of elevated energy levels, temporal sequence of energy levels throughout the day, timing of "crash" if any, level of "crash" as compared with baseline, next day energy, alertness and exercise level. The randomization, blinding, methods, results and statistics are described in detail in Dr. Blum's clinical report to Living Essentials. Fifty-eight subjects started the trial and 42 completed the study, 63% were male and 37% female. The average age was 27.4 years (standard deviation ± 11), with approximately 61% of the study population never having ingested an energy drink, which would have reduced the biases in the study. All subjects had baseline metabolic laboratory values within normal limits, thus no obvious metabolic disorders within the study group.

9. The results of the study show that the 5-hour ENERGY drink had the longest period of increased activity of 4.92 hours (confidence interval 95%; SD ± 0.71; range 4.7-5.1 hours). The other two comparison drinks had increased activity of 4.39 and 4.34 hours (S.D.± 0.52 and ±0.68), respectively. Thus, the 5-hour ENERGY® product provided longer intervals of energy, as compared with the other products. In addition, approximately 70% of all subjects chose 5-hour ENERGY® as the best performing energy drink for the highest and longest effect.

10. In terms of the "crash" effect, this interval was measured from the peak (highest energy) until the point in time when each subject felt that they had reached the lowest energy point (fatigue) of the day (crash). The lowest energy level was reached 2.43 hours after the peak for 5-hour ENERGY® product as compared with 1.36 and 1.43 hours for Red Bull and Monster, respectively. Approximately 75-80% of the subjects using other energy drinks complained of moderate to severe crashing leaving them feeling extremely fatigued, where their energy level was below their morning baseline level. The 5-hour ENERGY® drink had a longer effect with the lowest energy point being reached 2.43 hours after peak energy. Only 24% of the 5-hour energy user reported this effect, but the effect did not go below their initial morning baseline energy level, thus indicating a gentler let down.

11. The study also demonstrated that the actual peak levels achieved by each of the products were comparable and no statistical differences were found. In addition, there were several categories that did not show any differences between the drinks including cognitive testing, metabolic rates, and exercise parameters. Finally the Blum study concluded that for the primary endpoints, 5-hour ENERGY® outperformed the other two beverages, Monster® and Red Bull®.

12. Thus, the data from the Blum clinical trial supports Living Essentials claim of 5 hours of energy for its 5-hour ENERGY® product and a gradual slowing of energy with "no crash" or fatigue reported below morning baseline values for each subject.

13. The results of the Blum clinical study has been disputed by Hansen. I disagree. The Blum study was performed by a reputable investigator at an independent clinical center. The trial methodology was of good quality and the results obtained significant overall. As described above the mean for the number of hours that 5-hour ENERGY® showed an increased energy level was 4.92 with a confidence interval of 95% (range 4.7 to 5.1). These clinical data fully support the Living Essentials' advertising claims. In terms of the "crash" data from the clinical study, the 5-

hour ENERGY® drink caused a slower decline in energy and unlike the other drinks did not cause a crash (lower energy level below the morning baseline). The statements by Hansen on page 4 of the memorandum appear to be based on incomplete information obtained from websites, as they do not have a copy of the report describing the clinical trial in detail and thus could not have possibly read it. Without the details of the study it would be impossible to "dispute both its methodology and results" as stated on Page 4 of Hansen's Memorandum in Support of Motion, if Hansen did not have access to or read the details of the Blum study. Thus, it is impossible to claim that 5-hour ENERGY® product provides no energy as also claimed by Dr. Davis, as he apparently has not reviewed the data.

Response to paragraphs 15-23: Scientific data on the ingredients in 5-hour ENERGY®

14. These comments are made in response to the assertion that the ingredients in the 5-hour ENERGY® product cannot enhance mental or physical energy. I disagree with Dr. Davis that a product that provides no net carbohydrates cannot provide energy. Simple carbohydrates such as the sugars used in many energy drinks are not the only source of energy. In fact, the body must absorb and metabolize carbohydrates into a source of energy that it can utilize. But there are other sources of energy such as fats[7], proteins and amino acids. In addition, the muscles store energy as glycogen, which is thought to be the primary source of carbohydrate energy for strenuous exercise.[8] The 5-hour ENERGY® product contains: Niacin 30mg; Vitamin B6 40 mg; Folic acid 200 mcg; Vitamin B12 500 mcg; Taurine, Gluronolactone, Malic acid, N-acetyl-L-tyrosine; L-phenylalanine; caffeine, citicoline. It is well accepted that amino acids and B vitamins are essential for glucose metabolism and energy formation in the body. Moreover, caffeine which is a widely recognized

[7] Lambert EV, Hawley JA, Goedecke J et al., Nutritional strategies for promoting fat utilization and delaying onset of fatigue during prolonged exercise. J Sports Sci, 1997:315-324.

[8] Coggan AR, Coyle EF. Carbohydrate during prolonged exercise: effects on metabolism and performance. Exerc Sport Sci Rev 1991; 19:1-40.

central nervous system stimulant shown to enhance physical performance in doses ranging from 150 mg to 650 mg.[9]

15. The 5-hour ENERGY® product contains taurine, N-acetyl-L-tyrosine, B-vitamins, and caffeine. All of these ingredients have plausible mechanisms by which they can enhance energy levels-both mental and physical. Data from the scientific and medical literature concerning the impact of these ingredients on metabolism, and energy production are presented below.

16. Taurine, or 2-aminoethanesulfonic acid, is an organic acid and a major constituent of bile and can be found in the lower intestine and amounts in the tissues of many animals and in humans. While generally described as a non-essential amino acid, taurine lacks a carboxyl group normally seen on amino acids. Taurine is reported to be involved in the control of glucose homeostasis and insulin activity.[10,11] In mice treated with taurine for 30 days, blood glucose homeostasis was assessed by intraperitoneal glucose tolerance tests and islet cell function was determined by insulin secretion. The results of this study demonstrate that taurine supplemented mice had improved glucose tolerance tests. The study also suggested that taurine controls glucose homeostasis by regulating the expression of genes required for glucose-stimulated insulin secretion and by enhancing peripheral insulin sensitivity.[10] Another animal study has demonstrated that taurine is necessary for normal skeletal muscle functioning. This 2004 study, used mice with a genetic taurine deficiency.[12] The mice had a nearly complete depletion of skeletal and cardiac muscle taurine levels. These mice had a reduction of more than 80% of exercise capacity compared with control mice. Indicating that taurine is important for exercise performance. Taurine is an

[9] Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.
[10] Carnerio et al. Taurine supplementation modulates glucose homeostasis and islet function. J. Nutr Biochem 2008 (eprint).
[11] American Pharmaceutical Association, Handbook of Non-prescription drugs, 10th edition. APhA, Washington, DC 1990, pp. 300.
[12] Warskulat, Flogel U, Jacoby C, Hartwig HG, Thewissen M, Merx MW, Molojavyi A, B. Heller-Stilb, J. Schrader, Haussinger D. "Taurine transporter knockout depletes muscle taurine levels and results in severe skeletal muscle impairment but leaves cardiac function uncompromised". Faseb J. 2004;03–0496.

ingredient in many energy drinks, and may improve energy levels by stabilizing blood glucose. One clinical study of an energy supplement containing taurine along with creatine, caffeine and glucuronolactone (caffeine and glucuronolactone are also ingredients in 5-hour ENERGY®) examined the effect of energy supplement hormonal response in resistance training.[13] Although significant differences were seen only at set 5 of repetitions, the total number of repetitions and training volume tended to be higher in the group taking the supplement as compared with placebo. The results of this study suggest that a pre-exercise energy supplement containing taurine (and other ingredients also found in 5-hour ENERGY®) consumed 10 minutes before resistance exercise may enhance acute exercise performance by increasing the number of repetitions performed and the total volume of exercise. In another clinical work the effects of an energy drink containing the ingredients taurine, glucuronolactone and caffeine were assessed in 3 studies involving 36 subjects.[14] Measurements of primary outcomes included psychomotor performance (reaction time, concentration, memory), subjective alertness and physical endurance. When compared with control drinks, the drink containing the taurine, glucuronolactone and caffeine significantly ($P < 0.05$) improved aerobic endurance (maintaining 65-75% max. heart rate) and anaerobic performance (maintaining max. speed) on cycle ergometers. Significant improvements in mental performance included choice reaction time, concentration (number cancellation) and memory (immediate recall), which reflected increased subjective alertness. These performance improvements were interpreted as reflecting the effects of the combination of ingredients. Thus, the effects of this combination are well substantiated and not controversial in the scientific and medical literature.

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[13] Hoffman JR et al. Effect of pre-exercise energy supplement on the acute hormonal response to resistance training. J Strength Cond Res, 2008; 22:874-882.

[14] Alford C, Cox H, Wescott R. The effects of red bull energy drink on human performance and mood. Amino Acids 2001;21:139-150.

17. Tyrosine, one of the other ingredients in 5-hour ENERGY®, is a large neutral amino acid found in most protein containing foods.[15] Tyrosine is the metabolic precursor for the catecholamine neurotransmitters dopamine, epinephrine, and norepinephrine that play a significant role in attention, arousal and mood. In stressful or fatigue situations, these neurotransmitters may be depleted and thus tyrosine supplementation may alleviate stress or fatigue-induced decrements in performance of tasks demanding cognition and psychomotor skills.[16] These effects of tyrosine fit into the central hypothesis for fatigue, which is in addition to the peripheral muscular fatigue (which involves a reduction in blood glucose and muscle glycogen).[17] The central hypothesis of fatigue suggests that the central nervous system plays an important role in fatigue and that stimulation of the CNS will reduce both mental and physical fatigue. Both types of fatigue (peripheral and central) can potentially occur in individuals at rest and during vigorous exercise. Individuals in a rested state or performing low-intensity daily activities are less likely to have peripheral fatigue because fuel is readily available. The CNS mechanisms are more likely to promote fatigue experienced during normal daily activities.[17] Furthermore, feelings of fatigue are a common feature in situations such as postoperative recovery, jet lag, sleep deprivation, post-meal drowsiness, and chronic fatigue syndrome, all of which do not apparently involve muscle defects. Evidence is accumulating in support of a role for the neurotransmitter serotonin or 5-hydroxytryptamine (5-HT), and perhaps dopamine, in central fatigue during prolonged exercise. Since tyrosine supplementation increases dopamine levels in the brain, it has been hypothesized that tyrosine supplementation may work via a central mechanism somewhat like other centrally acting chemical and drugs.

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[15] IOM. Use of dietary supplements by military personnel. National Academies of Science, Washington DC, 2008.
[16] IOM. Use of dietary supplements by military personnel. National Academies of Science, Washington DC, 2008.
[17] Davies et al. Serotonin and central nervous system fatigue: nutritional considerations. Amer J Clin Nutr, 2000; 72:573S-578S.

18. Caffeine (1,3,7-trimethyl-1H-purine-2,6(3H,7H)-dione is one of the most commonly ingested naturally occurring substances and is present in over 60 plants.[18] One mechanism of action of caffeine is as a central nervous system stimulant. The IOM Committee on Military Nutrition concluded in its 2001 review on caffeine that caffeine in the range of 100-600 mg is effective for increasing the speed of reaction time without affecting accuracy.[19] It recommends doses of 200-600 mg of caffeine to increase physical performance and 100-600 mg to increase mental performance. Caffeine ingestion is associated with reproducible increases in endurance time in physical activities of moderate intensity and long duration.[20]Caffeine has been consistently found to enhance physical endurance performance when administered in amounts ranging from 150-650 mg.[21] Caffeine improves aerobic endurance by increasing fat oxidation and sparing muscle. Four separate reviews have concluded that caffeine consistently enhanced endurance performance in a wide range of physical activities (all cited in the IOM report). The 5-hour ENERGY® product contains a dose of caffeine comparable to that of a cup of the leading premier coffee per serving, thus falls within the acceptable range for an energy effect. This dose is well below > 600 mg of caffeine in one dose as cited by the Institute of Medicine as causing neuromuscular manifestations ("jitters").[22] Caffeine is rapidly and completely absorbed in humans, with 99% being absorbed within 45 minutes of ingestion. Peak plasma concentrations are observed within 15 minutes to 120 minutes and it readily passes through the blood brain barrier. Furthermore, the mean half-life of caffeine in plasma of healthy individuals is approximately 5 HOURS, with an elimination half-life in the range of 1.5 to 9.5 hours.[23] Thus, the caffeine present in 5-hour ENERGY® would be sufficient to explain the quick action of the supplement and the 5-hour energy claim. The IOM report on caffeine alone

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18 IOM. Use of dietary supplements by military personnel. National Academies of Science, Washington DC, 2008.
19 Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.
20 IOM. Use of dietary supplements by military personnel. National Academies of Science, Washington DC, 2008.
21 Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.
22 Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.
23 Institute of Medicine, Caffeine for the sustainment of mental task performance. IOM 2001.

totally debunks the concept that one needs calories or carbohydrate to enhance physical performance.

19. The B vitamins, niacin, Vitamin B6 and B12 are also ingredients in the 5-hour ENERGY® supplement. Vitamins serve primarily as regulators of metabolic functions, many of which are critical to exercise performance. Vitamins have long been recognized as ergogenic agents, namely agents that improve physical capacity performance. Depending upon the nature of their sport, e.g., strength, speed, power, endurance, or fine motor control, athletes may use megadoses of various vitamins in attempts to increase specific metabolic processes important to improved performance.[24] Surveys have indicated that most elite athletes do take vitamin supplements, often in dosages greater than 50-100 times the United States Recommended Dietary Allowances. B vitamins such as niacin, pyridoxine and pantothenic acid are all involved in muscle cell energy metabolism; niacin may also block free fatty acid release; pyridoxine is involved in the synthesis of hemoglobin and other oxygen transfer protein; folic acid and vitamin B12 are integrally involved in red blood cell (RBC) development.[25] In an 8-week, double-blind, clinical study of combined restriction of thiamin, riboflavin, and vitamins B-6 and C involving 23 healthy males. During 8 wk of low vitamin intake, 12 deficient subjects consumed daily a diet of normal food products, providing only 32.5% of the RDA for thiamin, riboflavin, vitamins B-6 and C. In deficient test subjects blood vitamin levels, urinary vitamin excretion, and erythrocytic enzyme activities decreased; in vitro enzyme stimulation increased. A combined restricted intake of thiamin, riboflavin, and vitamins B-6 and C causes a decrease in physical performance within a few weeks.[26] Thus, these vitamins are needed for optimal physical energy. Thus, the claim of "B-Vitamins for energy" is scientifically valid, substantiated, and well accepted.

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[24] Williams MH. Vitamin supplementation and athletic performance. Int. J. Vitamin Nutr Res Suppl. 1989, 30:163-191.
[25] Goodman and Gilman's The Pharmacological basis of therapeutics. 9th edition, McGraw Hill, New York, 1996.

20. Niacin, also known as niacinamide, is involved in energy production from carbohydrate, protein, and fat; glycogen synthesis; and normal cellular metabolism through its active coenzymes.[27] These enzymes, nicotinamide adenine dinucleotide (NAD) and nicotinamide adenine dinucleotide phosphate (NADP), are essential for normal muscle function. Vitamin B6 functions in reactions related to protein synthesis by aiding in the creation of amino acids and proteins (transamination reactions) and is also involved in protein catabolism through involvement in reactions that break down amino acids and proteins (deamination reactions).[25] It is involved, therefore, in manufacturing muscle, hemoglobin, and other proteins critical for physical performance.

21. Vitamin B12, commonly referred to as cyanocobalamin, contains a single atom of colbalt and is one of the most complex of the vitamin molecules. Vitamin B12 is active in all cells, especially those in the central nervous system, bone marrow, and gastrointestinal tract.[28] Vitamin B12 is involved in fat, protein and carbohydrate metabolism. It is needed for the metabolism of folates, is usually given together with folic acid (as is seen in the product 5-hour ENERGY). Vitamin B12 is used often in medical practice in the treatment of patients complaining of tiredness (fatigue) with no known cause.[29] Severe deprivation of folate and vitamin B12 result in anemia and reduce endurance work performance. In a pilot study of vitamin B12 in the treatment of tiredness (fatigue) showed that the test subjects showed a favorable response to vitamin B12 as regards well-being, appetite, mood and energy, with a statistically significant response in respect of general well-being.[29] However, other trials were negative and thus the clinical data are inconsistent and require further assessment.

[26] van der Beek EJ, van Dokkum W, Schrijver J, Wedel M, Gaillard AW, Wesstra A, van de Weerd H, Hermus RJ. Thiamin, riboflavin, and vitamins B-6 and C: impact of combined restricted intake on functional performance in man. Am J Clin Nutr. 1988;48:1451-1462.

[27] Goodman and Gilman's The Pharmacological basis of therapeutics. 9th edition, McGraw Hill, New York, 1996.

[28] American Pharmaceutical Association, Handbook of Non-prescription drugs, 10th edition. APhA, Washington, DC 1990.

22. Folic acid is metabolized in the body and is involved in DNA synthesis. A deficiency of folic acid results in impaired cell division and protein synthesis.[30]The symptoms include lack of coordination, impaired sense of position, and behavioral disturbances. Because Vitamin B12 is needed for the metabolism of folic acid, these two vitamins are often given together.[31]Thus, B vitamins are essential for metabolic processes associated with physical performance, and deficits of these vitamins have been shown to negatively effect physical performance, thus they have a plausible mechanism of action in energy production.

Response to paragraphs 22-25

23. In addition to the actions of the B-vitamins and amino acids as described above, the Living Essentials' decaffeinated product contains choline. Choline has historically been identified as part of the vitamin B complex.[32] Choline accelerates the synthesis and release of acetylcholine, an important neurotransmitter in the brain involved in memory storage, muscle storage and muscle control.[33] When rats are administered choline, the concentrations of plasma choline, brain choline and brain acetylcholine increase.[34] Choline plays a central role in many other physiological pathways besides acetylcholine production, including cell membrane signaling (phospholipids), lipid transport (lipoproteins), and methyl-group metabolism (homocysteine reduction).[35] Endurance exercise appears to stress several of these pathways, increasing the demand for choline as a metabolic substrate. A recent review examined the current literature linking endurance exercise and choline demand in the human body, and the mechanisms by which exercise might affect blood

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[29] Than TN et al. Effect of Vitamin B12 on physical performance capacity. Brit J Nutr 1978, 40:269-271.
[30] American Pharmaceutical Association, Handbook of Non-prescription drugs, 10th edition. APhA, Washington, DC 1990, pp 294.
[31] American Pharmaceutical Association, Handbook of Non-prescription drugs, 10th edition. APhA, Washington, DC 1990, pp. 294.
[32] Goodman and Gilman's The Pharmacological basis of therapeutics. 9th edition, McGraw Hill, New York, 1996.
[33] Institute of Medicine. Nutrient composition of rations for short term, high intensity combat operations. IOM, National Academies Press, Washington, DC, 2006, pp. 77.
[34] Goodman and Gilman's The Pharmacological basis of therapeutics. 9th edition, McGraw Hill, New York, 1996.
[35] Penry JT, Manore MM. Choline: an important micronutrient for maximal endurance-exercise performance. Int. J. Sports Exerc Metab, 2008; 18:191-203.

choline levels.[31]. The review concluded that most individuals consume adequate amounts of choline, although there is evidence that current recommendations for choline intake may be insufficient for some adult men. Strenuous and prolonged physical activity appears to significantly decrease circulating choline stores and that oral choline supplementation may benefit endurance performance in activities that reduce circulating choline levels below normal.[31]

24. The details of the pharmacokinetics and pharmacodynamics of caffeine as published by the Institute of Medicine at the National Academies of Science in Washington, DC[36] are described above and differ slightly from the details provided by Dr. Davis. In addition, the statements made by Dr. Davis do not take into account the other ingredients found in the 5-hour ENERGY® product, or any synergistic effects of the ingredients, which may also explain the 5 hours of energy observed in the clinical study.

I declare under penalty of perjury that the facts in this declaration are true and correct, based on my own personal knowledge and on generally accepted science which I believe to be true and correct.

Date: 8/29/08

Gail B. Mahady Ph.D.

[36] Institute of Medicinc, Caffeine for the sustainment of mental task performance. IOM 2001.

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

DECLARATION OF GAIL B. MAHADY Ph.D. IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq.
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Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

EXHIBIT A

Gail B. Mahady, Ph.D.

Associate Professor

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EDUCATION:

Postdoctoral Training	1991-1994	Department of Medicinal Chemistry and Pharmacognosy, College of Pharmacy, University of Illinois at Chicago, Chicago, Illinois, U.S.A.
Doctor of Philosophy	1991	Pharmacognosy, Department of Medicinal Chemistry and Pharmacognosy College of Pharmacy University of Illinois at Chicago, Chicago, Illinois U.S.A.
Bachelor of Science	1979	Pharmaceutical Chemistry College of Pharmacy, Dalhousie University, Halifax, Nova Scotia, Canada.

Professional Experience (UIC):

- **Associate Professor,** Department of Pharmacy Practice, College of Pharmacy, UIC, 2007-present
- **Assistant Professor,** Department of Pharmacy Practice, College of Pharmacy, UIC, 2001-2006.
- **Committee Member:** Institute of Medicine, Committee on Dietary Supplements Use by Military Personnel, National Academy of Sciences, Washington DC, 2006-2008.
- **Committee Member:** United States Pharmacopoeia Convention, Expert Committee on Dietary Supplements Information, Rockville, MD, 2001-2010.
- **Grant Reviewer:** National Institutes of Health, National Center on Complementary and Alternative Medicine, Bethseda, MD, 2001-present.

- **Temporary Advisor:** World Health Organisation, Traditional Medicines Programme, Geneva, Switzerland, 1996-present.
- **Advisory Board Member**, UIC/NIH Center for Botanical Dietary Supplements Research for Women's Health, UIC, 2005-2007.
- **Associate Director and Editor** for the NAPRALERT, a database of world literature on natural products, 1995-present.
- **Honors College Fellow**, University of Illinois at Chicago, 2002-present.
- **Review Committee Faculty Member**, Hans Vahlteich Endowment Scholarship Program, College of Pharmacy, UIC, 2005
- **Review Committee Faculty Member**, Institute for Tuberculosis Research Fund Committee, College of Pharmacy, UIC, 2005
- **Research Faculty**, the PAHO/WHO Collaborating Centre, College of Pharmacy, UIC 1995-present.
- **Leader**-Education and Information Core-Center for Botanical Dietary Supplements Research 1999-2005.
- **Developer, Coordinator and Lecturer** for the College of Pharmacy Online Continuing Education Programs: Botanical Dietary Supplements for Women's Health 2001-2005; Botanical Dietary Supplements for Men's and Women's Health 2005-present.
- **Co-PI** Project 1, UIC/NIH Center for Botanical Dietary Supplements Research 1999-2005.
- **Lecturer** in the Pharmacognosy Graduate Program and Professional Pharm D. Program 2000-present
- **Coordinator and lecturer** of Herbal Medicine section of the "Non-prescription and Herbal Medicines" course for professional pharmacy (Doctor of Pharmacy) students 2000-present.
- **Hans Vahlteich Scholar**, University of Illinois at Chicago, 1998-1999.
- **Coordinator** for curriculum development of the Herbal Medicine section of the core pharmacy curriculum

Other Professional Experience:

- Advisory Board Member, MDVIP Advisory Board for Formulary, University of the Health Sciences in Philadelphia, PA, 2005-present.
- Chair, Advisory Board, Clinical Trials for Policosanol in dyslipidemia of HIV/AIDS, NCCAM funded, Rush-Pres Medical College, Chicago, IL, 2005-present.
- Office of Dietary Supplements, NIH: Review Panel Member for Annual Bibliography of Significant Advances in Dietary Supplement Research, 2002-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1-LD 10 Tools and Technology to Measure Patient Adherence in Clinical CAM Research, 2006-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1, Centers of Excellence in CAM Research, 2006-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1 G 16S, 2004-2005.

- NCCAM/NIH, Review Panel Member, Review Panel ZAT LPR, 2005-2006.
- NCCAM/NIDDK/NIH, Member-Special Emphasis Review Panel (Intramural), 2005.
- NCCAM/NIH, Review Panel Member, ZAT1 G, CAM and Oncology Panel 2001-2005
- NCCAM/NIH, Review Panel Member, Training Grant Panel 2005-present.
- NIH/Fogerty International Center, Review Panel Member ICP-2, ICBG Review Panel, 2004-2005.
- Singapore National Medical Research Council, Research Development Executive Branch, Grant Reviewer 2003-present.
- Consultant for the Federal Trade Commission 1997-2005.
- Member- USP Expert Panel on Botanical Dietary Supplements Ad Hoc Panel, 1998-2000
- Working group member, American Pharmaceutical Association and American Dietetics Association (APhA/ADA) Working Group on Dietary Supplements 1999-2000
- Member, Steering Committee for Research in Botanical Dietary Supplements for the National Institute of Child Health and Development in conjunction with ODS and NCCAM 2000-20001
- Continuing education faculty member for UIC, Columbia University, Harvard Medical School, Center for Alternative Medicine Research 1998-2002.
- Scientific Advisory Board Member, Warner-Lambert Complementary Medicine Advisory Board 1998-1999, McNeil Consumer Health 1998-2001, Novartis Consumer Health SA 2000-2001
- Panel Member, Procter & Gamble Herbal Medicines Safety Panel, 1999-2000
- Member, International Collaboration for Information on Traditional and Complementary Medicine Databases, Columbia University, College of Physicians and Surgeons, Center for Complementary and Alternative Medicine Research in Aging and Women's Health 2000-2003.

1994-2000
Research Assistant Professor, Program for Collaborative Research in the Pharmaceutical Sciences, College of Pharmacy, WHO-TRM Collaborating Center, University of Illinois at Chicago, Chicago, IL, U.S.A. Medicinal plant and tissue culture research; lecturer in Research in Pharmacognosy Graduate Program; Associate Director for the NAPRALERT, database of world literature on natural products.

1991-1994
Research Associate, Dept. of Medicinal Chemistry and Pharmacognosy, University of Illinois at Chicago, IL, U.S.A.

PROFESSIONAL MEMBERSHIPS AND LICENSES:
American Society of Pharmacognosy
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American College of Clinical Pharmacy
American Association for the Advancement of Science
Illinois State Academy of Science

Society of Economic Botany
American Society of Pharmacology and Experimental Therapeutics
Registered Pharmacist (Illinois)

Reviewer/Editor
Associate Director and Editor: Napralert Database
Associate Editor: Pharmaceutical Biology
Contributing Editor: Nutrition Reviews
Contributing Editor: Journal of Oncology and Integrative Medicine
Editorial Advisory Board: Clinical Medicine: Diabetes and Endocrinology
Editorial Advisory Board: Cancer and Integrative Medicine
Editorial Advisory Board: American Botanical Council
Editorial Advisory Board: Journal of Pharmaceutical Science
Editorial Advisory Board: Journal of Medicinal Plants
Editorial Advisory Board: Phytomedicine
Reviewer for: Biological Reproduction, Phytomedicine, J. Natural Products, Journal of Women's Health, Journal of Agriculture and Food Chemistry, Blood Coagulation and Fibrinolysis, Breast Cancer Research and Treatment, Journal of the American Medical Women's Association

PUBLICATIONS

Books Authored or Co Authored

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Mahady G.B., Matsuura H, Pendland SL. Allixin, a garlic phytoalexin inhibits the growth of *Helicobacter pylori in vitro. American Journal of Gastroenterol.* 2001, 96:3454-3455.

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Mahady GB, Pendland SL, Stoia A et al. *In vitro* susceptibility of *Helicobacter pylori* to botanicals used traditionally for the treatment of gastrointestinal disorders. *Phytomedicine*, 2000 (Suppl II), 7:P-79.

Mahady GB, Fong HHS. *The safety and efficacy of herbal medicine*. In: Proceedings of the WHO/WPRO Regional workshop on traditional practice of medicine and health sector development, Samoa, 6-9 November 2000.

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Mahady G.B., Pendland S.L. Resveratrol from wine inhibits the growth of *Helicobacter pylori. Am. J. Gastroenterol.* 2000, 95:1849.

Mahady, G.B., Gylennhaal C., Farnsworth N.R., Fong, H.H.S. Ginsengs: A review of safety and efficacy. *Nutrition in Clinical Care* 2000, 3:90-101.

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Mahady GB. Herbal medicine and pharmacy education. *Journal of the American Pharmaceutical Association*, 1998, 38:274.

Mahady GB. The role of the pharmacist in the herbal renaissance. *Pharmacy Today*, 1998, 4:15.

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Abstracts

Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. The impact of pharmacists' knowledge, attitude and self-efficacy toward their performance of patient counseling on herbs and dietary supplements. Midwest Social & Administrative Pharmacy Conference MUSE 2008: Medication Use, Safety and Effectiveness, July 23 - 25, 2008.

Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. Development and validation of a measure to assess general and herbal and dietary supplement-specific patient counseling by pharmacists. American Association of Clinical Pharmacists Annual Meeting, 2008.

Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. VALIDATING A SURVEY INSTRUMENT USING NONPARAMETRIC ITEM RESPONSE THEORY – APPLICATION OF KERNEL REGRESSION. ISPOR 13th Annual International Meeting. Toronto, ON, Canada, May 3-7, 2008.

Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. Identification and creation of knowledge-based content and validation of a measure to assess pharmacist knowledge of herbal and dietary supplements: preliminary study. APhA Annual Meeting in San Diego, CA, March 18, 2008.

Doyle BJ, Locklear TD, Perez A, Laurtis J, **Mahady GB.** Alternative therapies for menopause from Costa Rica, effects on estrogen reporter gene assays. *FASEB Journal*, 2007, 21(5):A436 (Abstract 572.1)

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Mahady GB, Singletary K. Characterization of Proteomic and Metabolomic Responses to Dietary Factors and Supplements, Symposium session, 48th Annual Experimental Biology meeting, Washington, DC, April 29-May 3, 2007 (Abstract).

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Doyle BJ, Locklear TD, Perez A, **Mahady GB.** Validation of the Ethnomedical Use of Costa Rican Plants for the Treatment of Menopause. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract).

Locklear TD, Doyle BJ, Perez A, **Mahady GB.** Evaluation of the ethnomedical use of *Justicia pectoralis* for the treatment of dysmenorrhea. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract).

Michel JL, Caceres A, **Mahady GB.** Medical Ethnobotany of the Q'eqchi Maya: Perceptions and botanical treatments related to women's health. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract, winner of the best oral student presentation).

Mahady GB, Kennelly E, Doyle BJ, Locklear TD, Cotler S, Krishnaraj R. Fukinolic acid derivatives and triterpenes from black cohosh extracts inhibit CYP 450 isozymes but are not cytotoxic to HepG2 cells in vitro. In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).

Adeniyi BA, Lawal TO, Olaleye SB, **Mahady GB**. Antimicrobial and gastroprotective activities of *Eucalyptus camaldulensis* (Myrtaceae) crude extracts In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).

Yue Huang, Nikolic D, Doyle BJ, Locklear TD, **Mahady GB**. COX-2 PUF-LC-MS-Guided identification of active constituents from cranberry (*Vaccinium macrocarpon* Ait.). In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).

Adeniyi BA, Onwubuche BC, Ekundayo O, **Mahady GB**. In vitro anti-*Helicobacter pylori* activities of a methanol extract of *Eucalyptus grandis*. In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006.

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Michel J, Duarte RE, Caceres A, Soejarto DD, **Mahady GB**. Q'eqqchi Maya medicine for women's health. In: Proceedings of the Society of Economic Botany, Annual XVI Conference, Fort Worth, TX, 2004.

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O'Keefe, B., **Mahady, G.B.**, Schilling, A.B., Gillis, J.J., Beecher, C.W.W. Stable vindoline production in transformed suspension-cell cultures of *Catharanthus roseus* (L.) G. Don. In: *Biotechnology and Natural Products*. American Society of Pharmacognosy, 37th Annual Meeting, Santa Cruz, USA, 1996.

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Liu, D., **Mahady, G.B.**, Beecher, C.W.W. (1996) Isolation and characterization of a novel enzyme SAM:N-methyltransferase from suspension cultures of *Sanguinaria canadensis* L. In: *Biotechnology and Natural Products*. American Society of Pharmacognosy, 37th Annual Meeting, Santa Cruz, USA.

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Constant, H.L., **Mahady, G.B.**, Ramakrishna, K.V., Venton, D.L. and Beecher, C.W.W. (1995) Analysis of taxanes in *Taxus baccata* leaves, bark and gall tumor by negative ion electrospray HPLC/MS. In: *Natural Products as Prototype Antiinfectives: Discovery, Characterization and Development.* American Society of Pharmacognosy. 36th Annual Meeting, University of Mississippi, Oxford, USA.

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Marsh-Glen, M., **Mahady, G.B**. and Beecher, C.W.W. NMR studies of enzyme activity over the growth cycle of *Sanguinaria canadensis* cells. *Proceedings of the 10th International Biophysics Congress*, Vancouver, Canada, 1990.

Mahady, G.B. and Beecher, C.W.W.: The pattern of RNA synthesis during the fermentation of *Sanguinaria canadensis* tissue cultures. *Transactions of the Illinois State Academy of Sciences*, Northwestern University, Evanston, IL, October 1989.

Mahady, G.B.; Swanson, S.M. and Beecher, C.W.W.: Cell-free glycosylation of ^{3}H-steviol by extracts of *Stevia rebaudiana* propagation cultures. *Research Congress on Natural Products*, August 6-10, San Juan, PR 1989.

Mahady, G.B. and Beecher, C.W.W.: The pattern of macromolecular biosynthesis during alkaloid production in *Sanguinaria canadensis* suspension cells. *Research Congress on Natural Products*, San Juan PR, 1989.

Presentations:

Continuing Education Programs

- Mahady GB, Engle J. Botanical Dietary Supplements for Men's and Women's Health, College of Pharmacy, University of Illinois at Chicago, Online CE 2005-2009.
- Mahady GB, Engle J. Botanical Dietary Supplements for Women's Health, College of Pharmacy, University of Illinois at Chicago, Online CE 2001-2005
- Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health: A Scientific Research Update, University of Michigan Medical School, 10/3/2003
- Scientific Assessment of Herbal Medicines, Drug Information Association Annual Meeting, Chicago, IL 6/2002
- Mahady GB, Engle J. Research Update for Botanical Dietary Supplements in Women's Health, Columbia University College of Physicians and Surgeons, New York 5/2002
- Filing Botanical IND's , Harvard Medical School, Boston MA,4/2002
- Safety and Efficacy of Medicinal Herbs, Purdue University, IN, 01/28/02
- Mahady GB, Engle J. Botanical Dietary Supplements: Quality, safety and efficacy, April 5-6th, 2001 Ohio Pharmacist's Association
- Scientific Assessment of Herbal Medicines, Denver, CO, July 1-3, 2001, Drug Information Association
- Mahady GB, Engle J. Do Herbal Products Affect Quality of Life Issues for Women? October 22, 2001, NIH/Office of Dietary Supplements/American Dietetic Association
- Safety and Efficacy of Botanicals, American College of Physicians, Phildelphia, PA, June, 2001
- Quality, Safety and Efficacy of Botanicals, August 2001, San Diego, CA, NACDS
- Safety of Botanical Dietary Supplements, Veterans Administration, Arlington,Virginia, March 2000
- Center for Botanical Dietary Supplements, Harvard Medical School, Boston MA, March 2000
- Research Update for Botanical Dietary Supplements in Women's Health, Columbia University, College of Physicians and Surgeons, New York, May 2000

Invited Lectures/Presentations

1) **Mahady GB.** Botanical safety reviews of Ephedra, Ginseng, Ginkgo and Garlic, Clinical Summary of Safety and Efficacy. National Academies of Science, Institute of Medicine, June 10-12, 2007.
2) **Mahady GB.** In the Service of Human Health: The search for new Plant Based Therapies: Introduction to the Botanical Centers. The 48th Annual Society of Economic Botany Conference, Lake Forest, IL June 4-7th, 2007 (Symposium Co-Chair).
3) **Mahady GB**. Menopause, a Universal Female Experience, Views from Central America. The 11th Annual International Congress on Integrative Medicine, Edmonton, Alberta, Canada, May 24-28th, 2006. Podium talk, Session Co-Chair.
4) **Mahady GB**, Bhamarapravati S. Medicinal plants from Thailand for *Helicobacter pylori* infections. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Podium talk.
5) **Mahady GB.** ICBG symposium: Summary and Conclusions. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Symposium Co-chair.
6) Doyle BJ, Locklear TD, Perez A, **Mahady GB**. Validation of the Ethnomedical Use of Costa Rican Plants for the Treatment of Menopause. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Poster presentation.
7) Locklear TD, Doyle BJ, Perez A, **Mahady GB.** Evaluation of the ethnomedical use of *Justicia pectoralis* for the treatment of dysmenorrhea. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Poster presentation.

8) Michel JL, Caceres A, **Mahady GB**. Medical Ethnobotany of the Q'eqchi Maya: Perceptions and botanical treatments related to women's health. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Podium talk.
9) **Mahady GB**, Kennelly E, Doyle BJ, Locklear TD, Shord S, Krishnaraj R. Fukinolic acid derivatives and triterpenes from black cohosh extracts inhibit CYP 450 isozymes but are not cytotoxic to HepG2 cells in vitro. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
10) Adeniyi BA, Lawal TO, Olaleye SB, **Mahady GB**. Antimicrobial and gastroprotective activities of *Eucalyptus camaldulensis* (Myrtaceae) crude extracts. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
11) Yue Huang, Nikolic D, Doyle BJ, Locklear TD, **Mahady GB**. COX-2 PUF-LC-MS-Guided identification of active constituents from cranberry (*Vaccinium macrocarpon* Ait.) The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
12) Adeniyi BA, Onwubuche BC, Ekundayo O, **Mahady GB**. In vitro anti-*Helicobacter pylori* activities of a methanol extract of *Eucalyptus grandis*. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
13) Mahady GB, Engle J. Botanical Dietary Supplements for Women's Health, University of Costa Rica, San Jose, Costa Rica, February 24, 2005.
14) **Mahady GB**, Israel D, Peek R, Pendland SL. Ginger and turmeric inhibit acute and chronic gastritis in *Helicobacter pylori* infected Mongolian gerbils. International Congress on Natural Products Research, Phoenix, AZ July 31-Aug 4, 2004. Poster presentation.
15) **Mahady GB**. Traditional Medicines inhibit *Helicobacter pylori*, a group 1 carcinogen. 9th World Congress on Advances in Oncology and 7th International Symposium on Molecular Medicine 14-16 October, 2004, Creta Maris, Hersonissos, Crete, Greece. Poster presentation.
16) Bhamarapravati S., Juthapruth S., Mahachai W., **Mahady GB**. Antimicrobial activity of *Boesenbergia rotunda* (L) Mansf. and *Myristica fragrans* Houtt. against *Helicobacter pylori*, The 10th World Congress on Clinical Nutrition, November 30th- December 3rd, 2004, Phuket Thailand. Poster presentation.
17) **Mahady GB**, Engle J. Research Update from the Center for Botanical Dietary Supplements Research in Women's Health, University of San Carlos, Guatemala City, Guatemala, February 26, 2005.
18) Pendland SL, **Mahady GB**, Resnick LM, Bergstedt SW. Activity of Botanicals against Yeast. The 43rd Interscience Conference on Antimicrobial Agents and Chemotherapy, Chicago, IL, September 14-17, 2003. Poster presentation.
19) Dietz, Birgit, Pauli G, **Mahady GB**. Valerian extracts bind to the 5HT5a receptor in vitro. The 44th Annual Meeting of the American Society of Pharmacognosy, Chapel Hill, North Carolina, July, 12-16, 2003. Poster presentation.
20) Rimando A, **Mahady GB**, et al. Activity of Naturally Occurring Stilbenes Against Some Pathogenic Organisms. In: Proceedings of the American Chemical Society Annual Meeting, August 18-22, 2003, New Orleans, LA. Poster presentation.
21) **Mahady GB**. Survey on Botanical Dietary Supplement Use in Peri-and Post Menopausal Women, Functional Foods for Health Annual Meeting, Schaumberg, IL, July 10, 2003.
22) **Mahady GB**. Herb Drug Interactions, Rush Medical School, Schweitzer Fellows Presentation, Chicago, IL, 5/1/03.
23) **Mahady GB**. Botanical Dietary Supplements for Aging. Institute of Aging, Chicago, IL 04/25/03
24) **Mahady GB**. Center for Botanical Dietary Supplements Research: Update in Women's Health. WOCMAP III World Congress, Chang Mai, Thailand, February 7th, 2003.
25) **Mahady GB**. Botanical Dietary Supplements for the Elderly, National Institute of Health, Washington, DC, 01/13/03.
26) **Mahady GB**. Herbal Medicines: Safety and Efficacy. American Association of Retired Persons (AARP), Chicago, IL 02/18/03.
27) **Mahady GB**. Education and Information Workshop on Dietary Supplements, Center for Botanical Dietary Supplements Research, NIH/NCCAM, Bethesda, MD July 2002.
28) **Mahady GB.** Can plant-based medicines substitute for antibiotics in animal husbandry? Thai Ministry of Public Health Bangkok, Thailand, 10/20/2002.

29) **Mahady GB.** Predictive strategies for Natural Products Research using the Napralert Database. Mahidol University, Faculty of Pharmacy, October 2001.
30) **Mahady GB.** International Collaborations in Traditional Medicine Research, Mahidol University, Faculty of Science, October 2001.
31) Mahady GB, Engle J. Botanicals: Taking Steps and Making Choices, National Center on Women and Aging Westen Hotel, Chicago IL, 11/27/2001.
32) Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health, Illinois Department of Women's Health, Donald Stephens Convention Center, Rosemont, IL, 10/23/2001.
33) **Mahady GB.** Safety of Botanical Dietary Supplements, Federal Trade Commission, Chicago, IL 6/27/2001.
34) Mahady GB, Engle J. UIC/NIH Center for Botanical Dietary Supplements Research-Education and Information, Functional Foods for Health, Urbana, IL 6/10/2001.
35) Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health, Department of Public Health, Center for Excellence in Women's Health, Jim Thompson Center, Chicago, IL, 5/23/2001.
36) **Mahady GB.** Safety of Botanicals for Women's Health, Food and Drug Administration-Office of Women's Health Washington DC, 4/19/2001
37) **Mahady GB.** Safety of Safety of Herbal Medicines in Children-workshop, NIH/NICHD-Botanicals for Pediatrics, Washington, DC, 2/12/2001

Symposia:

Mahady GB, Soejarto DD. *MEDICINAL PLANTS OF SOUTHEAST ASIA: PAST, PRESENT AND FUTURE*, Society of Economic Botany, Chiang Mai, Thailand, June 4-7th, 2006.
Mahady GB, Singletary K (co-chairs). *Characterizing proteomic and metabolomic responses to dietary factors and supplements.* Experimental Biology Annual Meeting, Washington DC, April 2th, 2007.
Soejarto DD, **Mahady GB**, Gyllenhaal C, Franzblau S (co-chairs). *IN THE SERVICE OF HUMAN HEALTH: THE SEARCH FOR NEW PLANT-BASED THERAPIES,* Society of Economic Botany Annual Meeting, Lake Forest, IL, June 4-7th, 2007.

Oral Research Presentations

Mahady GB, Bhamarapravati S. Medicinal plants from Thailand for *Helicobacter pylori* infections. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006.

Mahady GB. Menopause, a Universal Female Experience, Views from Central America. In: The Proceedings of the 11th Annual International Congress on Integrative Medicine, Edmonton, Alberta, Canada, May 24-28th, 2006.

Mahady GB. Botanicals for Women's Health, a Research Update. World Congress on Medicinal and Aromatic Plants III Meeting, Chiang Mai, Thailand, February 5, 2003.

Mahady GB. College of Pharmacy Seminars: Survey of Botanical Dietary Supplement Usage by Menopausal Women, Wednesday Feb. 20, 2002.

Mahady GB, Schriever C, Chadwick LR, Pendland SL. In vitro susceptibility of *Chlamydia pneumonia* to red wine extracts and resveratrol, Society for Medicinal Plant Research, Barcelona, Spain, 9/3/2002.

Bharmapravati S, **Mahady GB**, Thabrew MI, Pendland SL. In vitro susceptibility of *Helicobacter pylori* to Traditional Medicines from Thailand and Sri Lanka Society for Medicinal Plant Research Barcelona, Spain 9/3/2002.

Mahady, GB, Pendland SL. In vitro susceptibility of *Helicobacter pylori* to extracts of ginger rhizome and isolated constituents, American Society of Pharmacognosy, Interim Meeting, Asilomar, CA 11/11/2001.

Mahady GB, Survey of Botanical Dietary Supplement Use in Menopausal Women American Society of Pharmacognosy, Interim Meeting, Asilomar, CA 11/11/2001.

Mahady GB. Traditional Medicines for the Treatment of *Helicobacter pylori* Infections COP, Hans W. Vahlteich Endowment Program for Faculty Research , College of Pharmacy, University of Illinois at Chicago, 12/1/2000.

Mahady G.B. Botanical Dietary Supplements and Drug Interactions, Center for Botanical Dietary Supplements Research, University of Illinois at Chicago, 11/13/2000.

Mahady GB, Fong HHS. The safety and efficacy of herbal medicine, WHO/WPRO Regional workshop, Samoa, 11/6/2000.

Mahady GB, Pendland SL, Stoia A et al. *In vitro* susceptibility of *Helicobacter pylori* to botanicals used traditionally for the treatment of gastrointestinal disorders, European Cooperative on Phytotherapy, Munich, Germany, 10/1/2000.

Mahady G.B., Pendland S.L. Resveratrol from wine inhibits the growth of *Helicobacter pylori.* European Cooperative on Phytotherapy, Munich, Germany, 10/1/2000

Research Interests and Funding

My research interests specifically focus on natural products and botanical dietary supplements and their application to the treatment of women's health disorders and infectious diseases and their chronic health consequences.

1. **Active/completed projects for the development and testing of novel natural agents for treatment/prevention of acute and chronic infectious disease.**

A. Botanicals for *Helicobacter pylori* infections. This work was funded by NCCAM/NIH during the period of 2/1/2001-6/30/2004 at a total award of $388,940.00 (Mahady-PI), R21 AT 00412-02. Collaboration with Mahidol University, Bangkok, Thailand.

B. Research and development of specific botanical extracts and/or combination of extracts for the prevention/treatment of *Chlamydia pneumoniae* (CP) infections and the impact of cardiovascular sequelae, funded by the NCCAM/NIH R21 AT01317-01, for the period of 7/1/2004-12/31/2006, total amount $389,676.00 (Mahady-PI).

2. **International Women's Health Focus: currently in two areas, menopause and PMS**.

A. Botanicals from Central America for Menopause". This project is funded by the NCCAM/NIH as R21 AT02381-01, 9/1/2004-8/30/2008, total award $389,676.00, (Mahady-PI). This project will assess the safety and efficacy of botanical medicines from Guatemala and Costa Rica for the treatment of menopausal and PMS symptoms. This is a collaboration between UIC and University of San Carlos, Guatemala and University of Costa Rica. The overall goal of the proposed work is to develop standardized botanical extracts, based on the bioassay results, for the symptomatic treatment of menopause. The standardized extracts will then be used as the basis of an RO1 application to assess biological activity in an animal model and/or pilot human study. I am planning to submit an RO1 application for this work in Feb. 2007.

3. **Conference grant** (R13-AT02206-01) entitled "The Omics Revolution: Transcriptomics, Proteomics and Metabolomics in Dietary Supplement and Nutrition Research". Funded by the NCCAM/NIH/ODS/NCI, for the period of 9/1/2004 to 6/30/07, total award $35,000.00 (Mahady – PI). The objective of this work is to highlight advances in new and innovative research technologies and methodologies such as DNA microarray, chip technology and proteomics in

nutrition and dietary supplements research. A scientific symposium will be convened May 6-8[st], 2007, in Washington, DC. This scientific conference will provide state-of-the-art information about current advances and applications of geneomics, proteomics, metabolomics and data mining to dietary supplements and natural products research based on our growing understanding of these techniques. The program and speakers include:

"Protein Fingerprinting of Complex Mixtures", John Astle, Department of Internal Medicine, University of Texas Southwestern Medical Center,Dallas, TX

"Parallel Characterization of RNA and the Proteome by Top Down Mass Spectrometry", Neil Kelleher, Department of Chemistry, University of Illinois at Urbana-Champaign, IL

"Metabolic Profiling of Natural Products and Drugs", George Harrigan, Monsanto Company, Creve Coeur, MO.

"Metabolomics in Nutrition", Dr. J. Bruce German, Nestle Research Center, Lausanne, Switzerland.

4. **Research and Product Development:**

A. "Clean Mouth Sensations from Different Cultures". This project is funded by the Wm Wrigley Jr. Corporation, Chicago, IL for the period of 04/01/06 until 10/30/07. The project involves research and discovery of novel oral health products ($150,000 USD).

5. **World Health Organization:**

A. The development of the WHO Monographs on Selected Medicinal Plants, WHO Monographs on Selected Medicinal Plants, Volumes 1-4, WHO-TRM, 9/1/2004-12/30/2008, $65,000 (Mahady-Co-PI). This is joint project between the World Health Organization's Traditional Medicines Programme and the College of Pharmacy (PAHO/WHO Collaborating Center for WHO) at The University of Illinois. The monographs, currently Volumes I-IV are extensive reviews of widely used medicinal plants from around the world. This project is currently funded by the WHO-TRM through 2006. The official WHO Consultation for Volume 4 of the WHO Monographs was held in Salerno, Italy in October 2005.

6. **Completed grants:**

A. Center for Botanical Dietary Supplements Research on Women's Health. The Center is one of the five Botanical Centers funded by the NCCAM/NIH/ODS P50 AT 00155-404 (Farnsworth PI; Mahady Co-PI), Center of Botanical Dietary Supplements Research ($7.5 M) 9/20/1999-4/31/2005, Core B total funding $807,902 (Mahady). This work specifically focused its efforts on the investigation of the clinical safety and efficacy of 10 herbal supplements widely used in the U.S. for the symptomatic treatment of menopause, premenstrual syndrome and chronic urinary tract infections. As part of this project, two online Continuing Education Programs for Pharmacists were developed.

B. APFE Fellowship for graduate student Joanna Michel (Mahady-PI), American Foundation for Pharmaceutical Education, 1/2/2003-12/30/2005, $6000 per year. Ms. Michel successfully defended her thesis on March 8, 2006.

C. Completed WHO grants: WHO Monographs on Selected Medicinal Plants, Volume 1-3, funded from October 1995-August 2004, ($65-$80K per each volume).

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, v. INNOVATION VENTURES, LLC dba LIVING ESSENTIALS, a Michigan corporation, Defendant.	Case No. 08-cv-1166 IEG (POR) **DECLARATION OF SCOTT HENDERSON IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Date: September 15, 2008 Time: 1:30 a.m. Courtroom.: 1, Fourth Floor Judge: Irma E. Gonzalez Date Filed: 07/01/08

I, Scott Henderson, declare as follows:

1. I am the President of Innovation Ventures, LLC d/b/a Living Essentials (hereinafter "Living Essentials") located at 46570 Humboldt Drive, Novi, Michigan 48377.

2. Living Essentials is a national marketer and distributor of nutritional and dietary supplements.

3. Living Essentials is the owner of the 5 HOUR ENERGY® trademark which has been used by Living Essentials since at least September 2004 for use with our best-selling 5 HOUR ENERGY® supplement.

4. The 5 HOUR ENERGY® trademark was duly and lawfully registered and is currently registered on the Supplemental Register of the United States Patent and Trademark Office on September 27, 2005 as U.S. Registration No. 3,003,077 ("the '077 registration"). (Exhibit A.)

5. Living Essentials has used the 5 HOUR ENERGY® trademark continuously since September 2004 in connection with its supplements, including in connection with promotion, marketing and advertising of these supplements nationwide.

6. The 5 HOUR ENERGY® trademark and our product label have been extensively, continuously, and exclusively used with our products, and we have spent over $40 million in advertising and marketing the products with this trademark since September 2004.

7. Living Essentials utilizes a nationwide network of distributors and has sales of over $150 million of its 5 HOUR ENERGY® product.

8. Sales of the 5 HOUR ENERGY® product continue to grow, and based on Nielson ratings, has regularly been one of the best-selling and most successfully recognized supplements in the marketplace for years.

9. Over the years, our company has grown, and we currently have more than 40 employees.

10. The 5 HOUR ENERGY® product and trademark are the most important assets of our company, and if we are enjoined from using the 5 HOUR ENERGY® name, in my opinion, it will simply put us out of business.

11. If we are forced out of business, we will have to layoff our employees, which will adversely affect their ability to support their families.

12. We have spent years developing goodwill in our name and in convincing our distributors to sell and customers to buy our product bearing our trademark. These sales are reinforced by national marketing and advertising campaigns which are, likewise, directed to the trademark of the product.

13. If we are ordered to change the name of our product, it would have a disastrous effect on our relationship with our distributors and customers, and we would lose all of the goodwill we have built up to date in our brand.

14. In my opinion, this is a highly competitive business, and our distributors and customers would not readily buy a product from us with another name, and our relationships with our distributors and customers would be destroyed.

15. Likewise, as our sales of this product should exceed $150 million this year alone, the loss of profit to our company in this year alone would be in the tens of millions of dollars.

16. Additionally, if we were ordered to temporarily cease using our trademark, even if we eventually won the case, it would be impossible to reestablish the brand at a later date, as others would step in to fill the void left in the marketplace.

17. We have fought hard to obtain retail shelf space by providing our distributors and customers for our products with quality products and services, and if we have to change our name, we would lose that shelf space to our competitors. Our product bearing the 5 HOUR ENERGY® trademark has been distributed throughout virtually every state in the country. It is my belief that the racks bearing the 5 HOUR ENERGY® trademark are currently in tens of thousands of stores across the United States, ranging from convenience stores to national retail chains.

18. In short, there should be no misunderstanding with respect to this matter. Should the Court order a preliminary injunction that we can no longer use our 5 HOUR ENERGY®

trademark during the pendency of this case, we will go out of business, have to layoff our employees, and not be able to reestablish our business should we eventually prevail in the case.

19. Attached as Exhibit A is a true and authentic copy of a review performed by the National Advertising Division (NAD) of the Council of Better Business Bureaus (CBBB) and its conclusion rendered regarding advertising that is the same or similar to the advertising related to this motion.

20. Attached as Exhibit B is a true and authentic copy of a news release that was issued on November 27, 2007 summarizing the review performed by the NAD. This news release affirms that all of Living Essentials' energy performance claims for 5 HOUR ENERGY® are supported by publicly available scientific evidence.

21. Also, attached to this declaration as Exhibit C is a true and authentic copy of a clinical study conducted by Dr. Blum at the request of Living Essentials. This study was reviewed by the NAD and supports our understanding and position on the claims at issue in this case. This study is confidential business information that is closely protected and maintained by Living Essentials. If the details of this study are disclosed to others, in particular to competitors or potential competitors of Living Essentials, this could cause significant harm to Living Essentials and its business.

I declare under penalty of perjury that the foregoing is true and correct.

Scott Henderson

Dated: 8/29/08

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On August 29, 2008, I filed a copy of the following document(s):

DECLARATION OF SCOTT HENDERSON IN SUPPORT OF LIVING ESSENTIALS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Norman L. Smith, Esq. Edward J. McIntyre, Esq. Alison L. Pivonka, Esq. **SOLOMON WARD SEIDENWURM & SMITH** 401 B Street, Suite 1200 San Diego, CA 92101 (619) 231-0303	Attorneys for Plaintiff HANSEN BEVERAGE COMPANY nsmith@swsslaw.com emcintyre@swsslaw.com apivonka@swsslaw.com

Executed on August 29, 2008, at San Diego, California. I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

s/Nathan Hamler
Nathan R. Hamler, Esq.

EXHIBIT A

Gail B. Mahady, Ph.D.

Associate Professor

Director, Clinical Pharmacognosy Laboratory, Department of Pharmacy Practice,
Associate Director, NAPRALERT
College of Pharmacy, Rm 122, University of Illinois at Chicago, 833 S. Wood St.,
PAHO/WHO Collaborating Centre for Traditional Medicine,
Chicago, IL 60612, MC 886
Phone: (312) 996-1669 **Fax:** (312)-413-9843
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EDUCATION:

Postdoctoral Training	1991-1994	Department of Medicinal Chemistry and Pharmacognosy, College of Pharmacy, University of Illinois at Chicago, Chicago, Illinois, U.S.A.
Doctor of Philosophy	1991	Pharmacognosy, Department of Medicinal Chemistry and Pharmacognosy College of Pharmacy University of Illinois at Chicago, Chicago, Illinois U.S.A.
Bachelor of Science	1979	Pharmaceutical Chemistry College of Pharmacy, Dalhousie University, Halifax, Nova Scotia, Canada.

Professional Experience (UIC):

- **Associate Professor,** Department of Pharmacy Practice, College of Pharmacy, UIC, 2007-present
- **Assistant Professor,** Department of Pharmacy Practice, College of Pharmacy, UIC, 2001-2006.
- **Committee Member:** Institute of Medicine, Committee on Dietary Supplements Use by Military Personnel, National Academy of Sciences, Washington DC, 2006-2008.
- **Committee Member:** United States Pharmacopoeia Convention, Expert Committee on Dietary Supplements Information, Rockville, MD, 2001-2010.
- **Grant Reviewer:** National Institutes of Health, National Center on Complementary and Alternative Medicine, Bethseda, MD, 2001-present.

- **Temporary Advisor:** World Health Organisation, Traditional Medicines Programme, Geneva, Switzerland, 1996-present.
- **Advisory Board Member**, UIC/NIH Center for Botanical Dietary Supplements Research for Women's Health, UIC, 2005-2007.
- **Associate Director and Editor** for the NAPRALERT, a database of world literature on natural products, 1995-present.
- **Honors College Fellow**, University of Illinois at Chicago, 2002-present.
- **Review Committee Faculty Member**, Hans Vahlteich Endowment Scholarship Program, College of Pharmacy, UIC, 2005
- **Review Committee Faculty Member**, Institute for Tuberculosis Research Fund Committee, College of Pharmacy, UIC, 2005
- **Research Faculty**, the PAHO/WHO Collaborating Centre, College of Pharmacy, UIC 1995-present.
- **Leader**-Education and Information Core-Center for Botanical Dietary Supplements Research 1999-2005.
- **Developer, Coordinator and Lecturer** for the College of Pharmacy Online Continuing Education Programs: Botanical Dietary Supplements for Women's Health 2001-2005; Botanical Dietary Supplements for Men's and Women's Health 2005-present.
- **Co-PI** Project 1, UIC/NIH Center for Botanical Dietary Supplements Research 1999-2005.
- **Lecturer** in the Pharmacognosy Graduate Program and Professional Pharm D. Program 2000-present
- **Coordinator and lecturer** of Herbal Medicine section of the "Non-prescription and Herbal Medicines" course for professional pharmacy (Doctor of Pharmacy) students 2000-present.
- **Hans Vahlteich Scholar**, University of Illinois at Chicago, 1998-1999.
- **Coordinator** for curriculum development of the Herbal Medicine section of the core pharmacy curriculum

Other Professional Experience:

- Advisory Board Member, MDVIP Advisory Board for Formulary, University of the Health Sciences in Philadelphia, PA, 2005-present.
- Chair, Advisory Board, Clinical Trials for Policosanol in dyslipidemia of HIV/AIDS, NCCAM funded, Rush-Pres Medical College, Chicago, IL, 2005-present.
- Office of Dietary Supplements, NIH: Review Panel Member for Annual Bibliography of Significant Advances in Dietary Supplement Research, 2002-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1-LD 10 Tools and Technology to Measure Patient Adherence in Clinical CAM Research, 2006-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1, Centers of Excellence in CAM Research, 2006-present.
- NCCAM/NIH, Review Panel Member, Review Panel ZAT1 G 16S, 2004-2005.

- NCCAM/NIH, Review Panel Member, Review Panel ZAT LPR, 2005-2006.
- NCCAM/NIDDK/NIH, Member-Special Emphasis Review Panel (Intramural), 2005.
- NCCAM/NIH, Review Panel Member, ZAT1 G, CAM and Oncology Panel 2001-2005
- NCCAM/NIH, Review Panel Member, Training Grant Panel 2005-present.
- NIH/Fogerty International Center, Review Panel Member ICP-2, ICBG Review Panel, 2004-2005.
- Singapore National Medical Research Council, Research Development Executive Branch, Grant Reviewer 2003-present.
- Consultant for the Federal Trade Commission 1997-2005.
- Member- USP Expert Panel on Botanical Dietary Supplements Ad Hoc Panel, 1998-2000
- Working group member, American Pharmaceutical Association and American Dietetics Association (APhA/ADA) Working Group on Dietary Supplements 1999-2000
- Member, Steering Committee for Research in Botanical Dietary Supplements for the National Institute of Child Health and Development in conjunction with ODS and NCCAM 2000-20001
- Continuing education faculty member for UIC, Columbia University, Harvard Medical School, Center for Alternative Medicine Research 1998-2002.
- Scientific Advisory Board Member, Warner-Lambert Complementary Medicine Advisory Board 1998-1999, McNeil Consumer Health 1998-2001, Novartis Consumer Health SA 2000-2001
- Panel Member, Procter & Gamble Herbal Medicines Safety Panel, 1999-2000
- Member, International Collaboration for Information on Traditional and Complementary Medicine Databases, Columbia University, College of Physicians and Surgeons, Center for Complementary and Alternative Medicine Research in Aging and Women's Health 2000-2003.

1994-2000
Research Assistant Professor, Program for Collaborative Research in the Pharmaceutical Sciences, College of Pharmacy, WHO-TRM Collaborating Center, University of Illinois at Chicago, Chicago, IL, U.S.A. Medicinal plant and tissue culture research; lecturer in Research in Pharmacognosy Graduate Program; Associate Director for the NAPRALERT, database of world literature on natural products.

1991-1994
Research Associate, Dept. of Medicinal Chemistry and Pharmacognosy, University of Illinois at Chicago, IL, U.S.A.

PROFESSIONAL MEMBERSHIPS AND LICENSES:
American Society of Pharmacognosy
American Society of Pharmacology and Experimental Therapeutics
American College of Clinical Pharmacy
American Association for the Advancement of Science
Illinois State Academy of Science

Society of Economic Botany
American Society of Pharmacology and Experimental Therapeutics
Registered Pharmacist (Illinois)

Reviewer/Editor
Associate Director and Editor: Napralert Database
Associate Editor: Pharmaceutical Biology
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Editorial Advisory Board: Clinical Medicine: Diabetes and Endocrinology
Editorial Advisory Board: Cancer and Integrative Medicine
Editorial Advisory Board: American Botanical Council
Editorial Advisory Board: Journal of Pharmaceutical Science
Editorial Advisory Board: Journal of Medicinal Plants
Editorial Advisory Board: Phytomedicine
Reviewer for: Biological Reproduction, Phytomedicine, J. Natural Products, Journal of Women's Health, Journal of Agriculture and Food Chemistry, Blood Coagulation and Fibrinolysis, Breast Cancer Research and Treatment, Journal of the American Medical Women's Association

PUBLICATIONS

Books Authored or Co Authored

Committee on Dietary Supplement Use by Military Personnel (**G.B. Mahady**, Committee Member), *Use of Dietary Supplements by Military Personnel*, Institute of Medicine, National Academies of Science, Washington, DC, 2008.

Farnsworth, N.R., Fong, H.H.S. and **Mahady, G.B.** (2008) *WHO Model Monographs on Selected Medicinal Plants*. Vol IV, World Health Organization, Traditional Medicine Programme, Geneva, Switzerland (in press).

Mahady G.B., Farnsworth, N.R., Fong, H.H.S. (2007) *WHO Model Monographs on Selected Medicinal Plants*. Vol III, World Health Organization, Traditional Medicine Programme, Geneva, Switzerland.

Farnsworth, N.R., Fong, H.H.S. and **Mahady, G.B.** (2002) *WHO Model Monographs on Selected Medicinal Plants*. Vol II, World Health Organization, Traditional Medicine Programme, Geneva, Switzerland.

Mahady G.B., Fong, H.H.S. and Farnsworth, N.R. (2001) *Botanical Dietary Supplements: Quality, Safety and Efficacy*. Swets and Zeilinger , The Netherlands.

Farnsworth, N.R., Fong, H.H.S. and **Mahady, G.B.** (1999) *WHO Monographs of Selected Medicinal Plants* Vol. 1, World Health Organization, Traditional Medicine Programme, Geneva, Switzerland.

Book Chapters

Mahady GB. Medicinal Plants for the Treatment and Prevention of Bacterial Infections. In: *Frontiers in Medicinal Chemistry*, edited by Prof. Atta-Ur-Rahman, Elsevier Science Publishers, Amsterdam, 2009.

Slover C, Danziger L, **Mahady GB**. Recent Advances in Natural Products for Methicillin Resistant *Staphylococcus aureus* (MRSA). In: *MDR Bacteria: Global Health Threat and Alternative Control Strategies*, I. Ahmed, ed., CRC Press, (2008 accepted, in press).

Slover C, Locklear T, Doyle BJ, Adeniyi B, Danziger L, **Mahady GB.** Efficacy of Herbal Medicines for *Helicobacter pylori* infections. In: *Health Promotion through Herbal Medicine* [-Approach for Evaluation of Natural Health Products].P. Houghton and P Murkerje eds., Pharmaceutical Press, London, UK, 2008.

Mahady, GB, Huang Y, Doyle BJ, Locklear TD. Antibacterial Agents from Natural Products, In: *Bioactive Natural Products*, edited by Prof. Atta-Ur-Rahman, Elsevier Science Publishers, Amsterdam, 2007.

Mahady, GB, Locklear TD, Doyle BJ, Huang Y, Chande T. Botanicals as treatment for infectious diseases. In: *The Encyclopedia of Herbal Medicine in Clinical Practice*, CABI Publishing, Wallingford, UK, 2007.

Mahady GB. Botanical Dietary Supplements for Coronary Heart Disease. In: Ethnomedicine; E. Elizabethsky, ed., UNESCO. Elioss Publishers, 2006.

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Bauer R, Dietz B, **Mahady G.B**. Botanicals for Pediatrics. In: Pediatric Nutrition in Chronic Diseases & Development Disorders Prevention, Assessment, and Treatment, Children with Special Health Care Needs, 2nd edition, S. Ekvall & V. Ekvall eds., Oxford University Press, Oxford, UK, 2005.

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Mahady, GB. World Health and International Collaboration in Traditional Medicine and Medicinal Plant Research. In: *What will Influence the Future of Alternative Medicine*? A World Perspective. Ed. D. Eskinazi, World Scientific Publishers, Singapore, 2001.

Peer Reviewed Articles

Authors:

Bolanle A. Adeniyi, T. O. Lawal, **Gail B. Mahady**. In Vitro Susceptibility of Helicobacter pylori to Extracts of *Eucalyptus camaldulensis* and *Eucalyptus torelliana*. *Pharmaceutical Biology*, 2009, accepted in press.

Yue Huang, Dejan Nikolic, Susan Pendland, Brian J. Doyle, Tracie D. Locklear, **Gail B. Mahady.** Effects of Cranberry Extracts and Ursolic Acid Derivatives on P-Fimbriated E. Coli, COX-2 Activity, Pro-Inflammatory Cytokine Release and the NF-κβ Transcriptional Response In Vitro. *Pharmaceutical Biology*, 2008, accepted in press.

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Gauss K, Huang Y, Israel D, Pendland S, Adeniyi BA, **Mahady GB**. Standardized ginger (*Zingiber officinale* Roscoe) extract reduces bacterial load and suppresses acute and chronic inflammation in Mongolian gerbils infected with *Cag A+ Helicobacter pylori*. *Pharmaceutical Biology*, 2008, accepted in press.

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Mahady G.B., Pendland S.L., Chadwick L.R. Red wine and resveratrol inhibit cagA+ strains of *Helicobacter pylori in vitro. Am. J. Gastroenterol.*, 2003, 98:1440-1441.

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Mahady GB, Parrot J, Lee C, Yun G, Dan A. Botanical Use by Peri and Post-Menopausal Women. *Menopause*, 2003, 10:65-72.

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Mahady GB, Schriever C, Chadwick LR, Pendland SL. *In vitro* susceptibility of *Chlamydia pneumonia* to red wine extracts and resveratrol. *Revista de Fitoterapia*, 2002, 2:183, A202.

Bharmapravati S, **Mahady GB**, Thabrew MI, Pendland SL. The effect of medicinal plant extracts from Thailand and Sri Lanka on the growth of *Helicobacter pylori* in vitro. *Revista de Fitoterapia*, 2002, 2:184, A203.

Mahady GB. Can plant-based medicines substitute for antibiotics in animal husbandry? In: *Proceedings of the International Conference on Medicinal Plants and Animal Husbandry*, Mahidol University, Bangkok, Thailand, October 24, 2002.

Mahady G.B. Ginkgo biloba: A review of the cardiovascular effects. *J Cardiovas Nurs*, 2002, 16(1):21-32.

Mahady G.B. *Ginkgo biloba*: A review of quality, safety and efficacy. *Nutr. Clin. Care.* 2001;4:140-147.

Mahady G.B., Matsuura H, Pendland SL. Allixin, a garlic phytoalexin inhibits the growth of *Helicobacter pylori in vitro*. *American Journal of Gastroenterol.* 2001, 96:3454-3455.

Mahady G.B. Qato DM, Gyllenhaal C, Chadwick LR, Fong HHS. *Echinacea*: Recommendations for its use in prophylaxis and treatment of respiratory tract infections. *Nutr. Clin Care*, 2001;4, 200-210.

Mahady G.B. Global harmonization of herbal health claims. *Journal of Nutrition* 2001, 131:1-4.

Mahady GB, Chadwick LR. Goldenseal: Is there enough science for therapeutic recommendations? *Nutr. Clin Care*, 2001;4:243-249.

Mahady GB, Pendland SL, Stoia A et al. *In vitro* susceptibility of *Helicobacter pylori* to botanicals used traditionally for the treatment of gastrointestinal disorders. *Phytomedicine*, 2000 (Suppl II), 7:P-79.

Mahady GB, Fong HHS. *The safety and efficacy of herbal medicine*. In: Proceedings of the WHO/WPRO Regional workshop on traditional practice of medicine and health sector development, Samoa, 6-9 November 2000.

Mahady G.B., Pendland S.L. Garlic and *Helicobacter pylori. Am. J. Gastroenterol.* 2000, 95:309-310.

Mahady G.B., Pendland S.L. Resveratrol from wine inhibits the growth of *Helicobacter pylori. Am. J. Gastroenterol.* 2000, 95:1849.

Mahady, G.B., Gylennhaal C., Farnsworth N.R., Fong, H.H.S. Ginsengs: A review of safety and efficacy. *Nutrition in Clinical Care* 2000, 3:90-101.

Mahady G.B. Botanicals: The complexities associated with assessing the clinical literature on efficacy. *Pharmacy and Therapeutics*, 2000, 25:128-132.

Farnsworth, N.R., **Mahady, G.B**. The Use of Botanicals in Women's Health: A Research Update. *Journal of Women's Health and Gender-Based Medicine*, 2000, 9:449.

Mahady GB. Herbal medicine and pharmacy education. *Journal of the American Pharmaceutical Association*, 1998, 38:274.

Mahady GB. The role of the pharmacist in the herbal renaissance. *Pharmacy Today*, 1998, 4:15.

Mahady, G.B., Liu, Chuan, Beecher, C.W.W. Involvement of protein kinase and G-proteins in the signal transduction of induced benzophenanthridine alkaloid biosynthesis. *Phytochemistry*, 1998, 48:93-102, 1998.

O'Keefe, B., **Mahady, G.B**., Schilling, A.B., Gills, J.J., Beecher, C.W.W. Stable vindoline production in transformed suspension-cell cultures of *Catharanthus roseus* (L.) G. Don. *J. Natural Products* 1997, 60:261.

Mahady, G.B. The Herbal Renaissance and Professional Education. In: *The Proceedings of the International Symposium of Herbal Medicine*, Jeddah, Saudi Arabia, March 24-27, 1997.

Mahady, G.B. (1997) Application of the Napralert Database to the Study of Traditional Chinese Medicine, In: *Proceedings of The International Symposium on Information and Publications in Traditional Chinese Medicine,* China Medical College, Taichung, Taiwan, 1997.

Mahady, G.B. and Fong, H.H.S. (1996) *Encyclopedia of Common Natural Ingredients used in Food, Drugs and Cosmetics*. Second Ed., John Wiley and Sons Inc., New York, N.Y. (Book Review) *Am. J. Pharm. Ed.* 60: 227.

Liu, C., **Mahady, G.B**. and Beecher, C.W.W. A highly specific SAM: tetrahydrocoptisine-N-methyltransferase from *Sanguinaria canadensis*. *Pharmaceutical Research* 13: 59-61, 1996

Mahady, G.B. and Beecher, C.W.W. Induction of benzo[c]phenanthridine alkaloid biosynthesis in suspension cell cultures of *Sanguinaria canadensis* by retinoic acid derivatives. *Natural Product Letters* 8: 173-180, 1996.

Mahady, G.B., and Beecher, C.W.W: Elicitor-induced benzophenanthridine biosynthesis in bloodroot suspension cells is mediated by calcium. *Phytochemistry* 37:214-217, 1994.

Mahady, G.B., Beecher, C.W.W.: Quercetin-induced benzophenanthridine alkaloid biosynthesis in suspension-cell cultures of *Sanguinaria canadensis*. *Planta Medica* 60: 553-557, 1994.

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Swanson, S.M.; **Mahady, G.B**. and Beecher, C.W.W.: Stevioside biosynthesis in callus, shoot, root and rooted-shoot cultures *in vitro. Plant Cell Tissue and Organ Culture* 28: 151-157, 1991.
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Abstracts

Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. The impact of pharmacists' knowledge, attitude and self-efficacy toward their performance of patient counseling on herbs and dietary supplements. Midwest Social & Administrative Pharmacy Conference MUSE 2008: Medication Use, Safety and Effectiveness, July 23 - 25, 2008.
Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. Development and validation of a measure to assess general and herbal and dietary supplement-specific patient counseling by pharmacists. American Association of Clinical Pharmacists Annual Meeting, 2008.
Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. VALIDATING A SURVEY INSTRUMENT USING NONPARAMETRIC ITEM RESPONSE THEORY – APPLICATION OF KERNEL REGRESSION. ISPOR 13th Annual International Meeting. Toronto, ON, Canada, May 3-7, 2008.
Hsiang-Wen Lin, A. Simon Pickard, George Karabatsos, **Gail B. Mahady**, Stephanie Y. Crawford, Nicholas G. Popovich. Identification and creation of knowledge-based content and validation of a measure to assess pharmacist knowledge of herbal and dietary supplements: preliminary study. APhA Annual Meeting in San Diego, CA, March 18, 2008.
Doyle BJ, Locklear TD, Perez A, Laurtis J, **Mahady GB.** Alternative therapies for menopause from Costa Rica, effects on estrogen reporter gene assays. *FASEB Journal*, 2007, 21(5):A436 (Abstract 572.1)
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Mahady GB, Singletary K. Characterization of Proteomic and Metabolomic Responses to Dietary Factors and Supplements, Symposium session, 48th Annual Experimental Biology meeting, Washington, DC, April 29-May 3, 2007 (Abstract).
Mahady GB, Bhamarapravati S. Medicinal plants from Thailand for *Helicobacter pylori* infections. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract of invited Podium presentation).
Doyle BJ, Locklear TD, Perez A, **Mahady GB.** Validation of the Ethnomedical Use of Costa Rican Plants for the Treatment of Menopause. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract).
Locklear TD, Doyle BJ, Perez A, **Mahady GB.** Evaluation of the ethnomedical use of *Justicia pectoralis* for the treatment of dysmenorrhea. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract).
Michel JL, Caceres A, **Mahady GB.** Medical Ethnobotany of the Q'eqchi Maya: Perceptions and botanical treatments related to women's health. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006 (Abstract, winner of the best oral student presentation).
Mahady GB, Kennelly E, Doyle BJ, Locklear TD, Cotler S, Krishnaraj R. Fukinolic acid derivatives and triterpenes from black cohosh extracts inhibit CYP 450 isozymes but are not cytotoxic to HepG2 cells in vitro. In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).
Adeniyi BA, Lawal TO, Olaleye SB, **Mahady GB**. Antimicrobial and gastroprotective activities of *Eucalyptus camaldulensis* (Myrtaceae) crude extracts In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).

Yue Huang, Nikolic D, Doyle BJ, Locklear TD, **Mahady GB**. COX-2 PUF-LC-MS-Guided identification of active constituents from cranberry (*Vaccinium macrocarpon* Ait.). In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006 (Abstract).

Adeniyi BA, Onwubuche BC, Ekundayo O, **Mahady GB**. In vitro anti-*Helicobacter pylori* activities of a methanol extract of *Eucalyptus grandis*. In: The Proceedings of the 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006.

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Constant, H.L., **Mahady, G.B.**, Ramakrishna, K.V., Venton, D.L. and Beecher, C.W.W. (1995) Analysis of taxanes in *Taxus baccata* leaves, bark and gall tumor by negative ion electrospray HPLC/MS. In: *Natural Products as Prototype Antiinfectives: Discovery, Characterization and Development.* American Society of Pharmacognosy. 36th Annual Meeting, University of Mississippi, Oxford, USA.

Mahady, G.B. and Beecher, C.W.W.: The role of calcium in the induction of secondary metabolism. In: *Proceedings of the International Research Congress on Natural Products*, pp.127, Chicago, IL, 1991.

Beecher, C.W.W., **Mahady, G.B.** and Schilling, A.B. The analysis of some isoquinoline alkaloids from cell cultures by particle beam LC/MS. In *Proceedings of the 38th ASMS Conference on Mass Spectroscopy and Allied Topics* pp. 1087-1090, Tucson, AZ, 1990.

Marsh-Glen, M., **Mahady, G.B**. and Beecher, C.W.W. NMR studies of enzyme activity over the growth cycle of *Sanguinaria canadensis* cells. *Proceedings of the 10th International Biophysics Congress*, Vancouver, Canada, 1990.

Mahady, G.B. and Beecher, C.W.W.: The pattern of RNA synthesis during the fermentation of *Sanguinaria canadensis* tissue cultures. *Transactions of the Illinois State Academy of Sciences*, Northwestern University, Evanston, IL, October 1989.

Mahady, G.B.; Swanson, S.M. and Beecher, C.W.W.: Cell-free glycosylation of ^{3}H-steviol by extracts of *Stevia rebaudiana* propagation cultures. *Research Congress on Natural Products*, August 6-10, San Juan, PR 1989.

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Presentations:

Continuing Education Programs

- Mahady GB, Engle J. Botanical Dietary Supplements for Men's and Women's Health, College of Pharmacy, University of Illinois at Chicago, Online CE 2005-2009.
- Mahady GB, Engle J. Botanical Dietary Supplements for Women's Health, College of Pharmacy, University of Illinois at Chicago, Online CE 2001-2005
- Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health: A Scientific Research Update, University of Michigan Medical School, 10/3/2003
- Scientific Assessment of Herbal Medicines, Drug Information Association Annual Meeting, Chicago, IL 6/2002
- Mahady GB, Engle J. Research Update for Botanical Dietary Supplements in Women's Health, Columbia University College of Physicians and Surgeons, New York 5/2002
- Filing Botanical IND's , Harvard Medical School, Boston MA,4/2002
- Safety and Efficacy of Medicinal Herbs, Purdue University, IN, 01/28/02
- Mahady GB, Engle J. Botanical Dietary Supplements: Quality, safety and efficacy, April 5-6th, 2001 Ohio Pharmacist's Association
- Scientific Assessment of Herbal Medicines, Denver, CO, July 1-3, 2001, Drug Information Association
- Mahady GB, Engle J. Do Herbal Products Affect Quality of Life Issues for Women? October 22, 2001, NIH/Office of Dietary Supplements/American Dietetic Association
- Safety and Efficacy of Botanicals, American College of Physicians, Phildelphia, PA, June, 2001
- Quality, Safety and Efficacy of Botanicals, August 2001, San Diego, CA, NACDS
- Safety of Botanical Dietary Supplements, Veterans Administration, Arlington,Virginia, March 2000
- Center for Botanical Dietary Supplements, Harvard Medical School, Boston MA, March 2000
- Research Update for Botanical Dietary Supplements in Women's Health, Columbia University, College of Physicians and Surgeons, New York, May 2000

Invited Lectures/Presentations

1) **Mahady GB.** Botanical safety reviews of Ephedra, Ginseng, Ginkgo and Garlic, Clinical Summary of Safety and Efficacy. National Academies of Science, Institute of Medicine, June 10-12, 2007.
2) **Mahady GB.** In the Service of Human Health: The search for new Plant Based Therapies: Introduction to the Botanical Centers. The 48th Annual Society of Economic Botany Conference, Lake Forest, IL June 4-7th, 2007 (Symposium Co-Chair).
3) **Mahady GB**. Menopause, a Universal Female Experience, Views from Central America. The 11th Annual International Congress on Integrative Medicine, Edmonton, Alberta, Canada, May 24-28th, 2006. Podium talk, Session Co-Chair.
4) **Mahady GB**, Bhamarapravati S. Medicinal plants from Thailand for *Helicobacter pylori* infections. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Podium talk.
5) **Mahady GB.** ICBG symposium: Summary and Conclusions. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Symposium Co-chair.
6) Doyle BJ, Locklear TD, Perez A, **Mahady GB**. Validation of the Ethnomedical Use of Costa Rican Plants for the Treatment of Menopause. The 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Poster presentation.
7) Locklear TD, Doyle BJ, Perez A, **Mahady GB.** Evaluation of the ethnomedical use of *Justicia pectoralis* for the treatment of dysmenorrhea. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Poster presentation.

8) Michel JL, Caceres A, **Mahady GB**. Medical Ethnobotany of the Q'eqchi Maya: Perceptions and botanical treatments related to women's health. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006. Podium talk.
9) **Mahady GB**, Kennelly E, Doyle BJ, Locklear TD, Shord S, Krishnaraj R. Fukinolic acid derivatives and triterpenes from black cohosh extracts inhibit CYP 450 isozymes but are not cytotoxic to HepG2 cells in vitro. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
10) Adeniyi BA, Lawal TO, Olaleye SB, **Mahady GB**. Antimicrobial and gastroprotective activities of *Eucalyptus camaldulensis* (Myrtaceae) crude extracts. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
11) Yue Huang, Nikolic D, Doyle BJ, Locklear TD, **Mahady GB**. COX-2 PUF-LC-MS-Guided identification of active constituents from cranberry (*Vaccinium macrocarpon* Ait.) The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
12) Adeniyi BA, Onwubuche BC, Ekundayo O, **Mahady GB**. In vitro anti-*Helicobacter pylori* activities of a methanol extract of *Eucalyptus grandis*. The 47th Annual American Society of Pharmacognosy Meeting, July 31st-August 7, 2006. Poster presentation.
13) Mahady GB, Engle J. Botanical Dietary Supplements for Women's Health, University of Costa Rica, San Jose, Costa Rica, February 24, 2005.
14) **Mahady GB**, Israel D, Peek R, Pendland SL. Ginger and turmeric inhibit acute and chronic gastritis in *Helicobacter pylori* infected Mongolian gerbils. International Congress on Natural Products Research, Phoenix, AZ July 31-Aug 4, 2004. Poster presentation.
15) **Mahady GB**. Traditional Medicines inhibit *Helicobacter pylori*, a group 1 carcinogen. 9th World Congress on Advances in Oncology and 7th International Symposium on Molecular Medicine 14-16 October, 2004, Creta Maris, Hersonissos, Crete, Greece. Poster presentation.
16) Bhamarapravati S., Juthapruth S., Mahachai W., **Mahady GB**. Antimicrobial activity of *Boesenbergia rotunda* (L) Mansf. and *Myristica fragrans* Houtt. against *Helicobacter pylori*, The 10th World Congress on Clinical Nutrition, November 30th- December 3rd, 2004, Phuket Thailand. Poster presentation.
17) **Mahady GB**, Engle J. Research Update from the Center for Botanical Dietary Supplements Research in Women's Health, University of San Carlos, Guatemala City, Guatemala, February 26, 2005.
18) Pendland SL, **Mahady GB**, Resnick LM, Bergstedt SW. Activity of Botanicals against Yeast. The 43rd Interscience Conference on Antimicrobial Agents and Chemotherapy, Chicago, IL, September 14-17, 2003. Poster presentation.
19) Dietz, Birgit, Pauli G, **Mahady GB**. Valerian extracts bind to the 5HT5a receptor in vitro. The 44th Annual Meeting of the American Society of Pharmacognosy, Chapel Hill, North Carolina, July, 12-16, 2003. Poster presentation.
20) Rimando A, **Mahady GB**, et al. Activity of Naturally Occurring Stilbenes Against Some Pathogenic Organisms. In: Proceedings of the American Chemical Society Annual Meeting, August 18-22, 2003, New Orleans, LA. Poster presentation.
21) **Mahady GB**. Survey on Botanical Dietary Supplement Use in Peri-and Post Menopausal Women, Functional Foods for Health Annual Meeting, Schaumberg, IL, July 10, 2003.
22) **Mahady GB**. Herb Drug Interactions, Rush Medical School, Schweitzer Fellows Presentation, Chicago, IL, 5/1/03.
23) **Mahady GB**. Botanical Dietary Supplements for Aging. Institute of Aging, Chicago, IL 04/25/03
24) **Mahady GB**. Center for Botanical Dietary Supplements Research: Update in Women's Health. WOCMAP III World Congress, Chang Mai, Thailand, February 7th, 2003.
25) **Mahady GB**. Botanical Dietary Supplements for the Elderly, National Institute of Health, Washington, DC, 01/13/03.
26) **Mahady GB**. Herbal Medicines: Safety and Efficacy. American Association of Retired Persons (AARP), Chicago, IL 02/18/03.
27) **Mahady GB**. Education and Information Workshop on Dietary Supplements, Center for Botanical Dietary Supplements Research, NIH/NCCAM, Bethesda, MD July 2002.
28) **Mahady GB.** Can plant-based medicines substitute for antibiotics in animal husbandry? Thai Ministry of Public Health Bangkok, Thailand, 10/20/2002.

29) **Mahady GB.** Predictive strategies for Natural Products Research using the Napralert Database. Mahidol University, Faculty of Pharmacy, October 2001.
30) **Mahady GB.** International Collaborations in Traditional Medicine Research, Mahidol University, Faculty of Science, October 2001.
31) Mahady GB, Engle J. Botanicals: Taking Steps and Making Choices, National Center on Women and Aging Westen Hotel, Chicago IL, 11/27/2001.
32) Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health, Illinois Department of Women's Health, Donald Stephens Convention Center, Rosemont, IL, 10/23/2001.
33) **Mahady GB.** Safety of Botanical Dietary Supplements, Federal Trade Commission, Chicago, IL 6/27/2001.
34) Mahady GB, Engle J. UIC/NIH Center for Botanical Dietary Supplements Research-Education and Information, Functional Foods for Health, Urbana, IL 6/10/2001.
35) Mahady GB, Engle J. Botanical Dietary Supplements in Women's Health, Department of Public Health, Center for Excellence in Women's Health, Jim Thompson Center, Chicago, IL, 5/23/2001.
36) **Mahady GB.** Safety of Botanicals for Women's Health, Food and Drug Administration-Office of Women's Health Washington DC, 4/19/2001
37) **Mahady GB.** Safety of Safety of Herbal Medicines in Children-workshop, NIH/NICHD-Botanicals for Pediatrics, Washington, DC, 2/12/2001

Symposia:

Mahady GB, Soejarto DD. *MEDICINAL PLANTS OF SOUTHEAST ASIA: PAST, PRESENT AND FUTURE*, Society of Economic Botany, Chiang Mai, Thailand, June 4-7th, 2006.
Mahady GB, Singletary K (co-chairs). *Characterizing proteomic and metabolomic responses to dietary factors and supplements.* Experimental Biology Annual Meeting, Washington DC, April 2th, 2007.
Soejarto DD, **Mahady GB**, Gyllenhaal C, Franzblau S (co-chairs). *IN THE SERVICE OF HUMAN HEALTH: THE SEARCH FOR NEW PLANT-BASED THERAPIES,* Society of Economic Botany Annual Meeting, Lake Forest, IL, June 4-7th, 2007.

Oral Research Presentations

Mahady GB, Bhamarapravati S. Medicinal plants from Thailand for *Helicobacter pylori* infections. In: The Proceedings of the 47th Society of Economic Botany Conference, Chiang Mai, Thailand, May 31st-June 9th, 2006.

Mahady GB. Menopause, a Universal Female Experience, Views from Central America. In: The Proceedings of the 11th Annual International Congress on Integrative Medicine, Edmonton, Alberta, Canada, May 24-28th, 2006.

Mahady GB. Botanicals for Women's Health, a Research Update. World Congress on Medicinal and Aromatic Plants III Meeting, Chiang Mai, Thailand, February 5, 2003.

Mahady GB. College of Pharmacy Seminars: Survey of Botanical Dietary Supplement Usage by Menopausal Women, Wednesday Feb. 20, 2002.

Mahady GB, Schriever C, Chadwick LR, Pendland SL. In vitro susceptibility of *Chlamydia pneumonia* to red wine extracts and resveratrol, Society for Medicinal Plant Research, Barcelona, Spain, 9/3/2002.

Bharmapravati S, **Mahady GB**, Thabrew MI, Pendland SL. In vitro susceptibility of *Helicobacter pylori* to Traditional Medicines from Thailand and Sri Lanka Society for Medicinal Plant Research Barcelona, Spain 9/3/2002.

Mahady, GB, Pendland SL. In vitro susceptibility of *Helicobacter pylori* to extracts of ginger rhizome and isolated constituents, American Society of Pharmacognosy, Interim Meeting, Asilomar, CA 11/11/2001.

Mahady GB, Survey of Botanical Dietary Supplement Use in Menopausal Women American Society of Pharmacognosy, Interim Meeting, Asilomar, CA 11/11/2001.

Mahady GB. Traditional Medicines for the Treatment of *Helicobacter pylori* Infections COP, Hans W. Vahlteich Endowment Program for Faculty Research , College of Pharmacy, University of Illinois at Chicago, 12/1/2000.

Mahady G.B. Botanical Dietary Supplements and Drug Interactions, Center for Botanical Dietary Supplements Research, University of Illinois at Chicago, 11/13/2000.

Mahady GB, Fong HHS. The safety and efficacy of herbal medicine, WHO/WPRO Regional workshop, Samoa, 11/6/2000.

Mahady GB, Pendland SL, Stoia A et al. *In vitro* susceptibility of *Helicobacter pylori* to botanicals used traditionally for the treatment of gastrointestinal disorders, European Cooperative on Phytotherapy, Munich, Germany, 10/1/2000.

Mahady G.B., Pendland S.L. Resveratrol from wine inhibits the growth of *Helicobacter pylori*. European Cooperative on Phytotherapy, Munich, Germany, 10/1/2000

Research Interests and Funding

My research interests specifically focus on natural products and botanical dietary supplements and their application to the treatment of women's health disorders and infectious diseases and their chronic health consequences.

1. **Active/completed projects for the development and testing of novel natural agents for treatment/prevention of acute and chronic infectious disease.**

A. Botanicals for *Helicobacter pylori* infections. This work was funded by NCCAM/NIH during the period of 2/1/2001-6/30/2004 at a total award of $388,940.00 (Mahady-PI), R21 AT 00412-02. Collaboration with Mahidol University, Bangkok, Thailand.

B. Research and development of specific botanical extracts and/or combination of extracts for the prevention/treatment of *Chlamydia pneumoniae* (CP) infections and the impact of cardiovascular sequelae, funded by the NCCAM/NIH R21 AT01317-01, for the period of 7/1/2004-12/31/2006, total amount $389,676.00 (Mahady-PI).

2. **International Women's Health Focus: currently in two areas, menopause and PMS**.

A. Botanicals from Central America for Menopause". This project is funded by the NCCAM/NIH as R21 AT02381-01, 9/1/2004-8/30/2008, total award $389,676.00, (Mahady-PI). This project will assess the safety and efficacy of botanical medicines from Guatemala and Costa Rica for the treatment of menopausal and PMS symptoms. This is a collaboration between UIC and University of San Carlos, Guatemala and University of Costa Rica. The overall goal of the proposed work is to develop standardized botanical extracts, based on the bioassay results, for the symptomatic treatment of menopause. The standardized extracts will then be used as the basis of an RO1 application to assess biological activity in an animal model and/or pilot human study. I am planning to submit an RO1 application for this work in Feb. 2007.

3. **Conference grant** (R13-AT02206-01) entitled "The Omics Revolution: Transcriptomics, Proteomics and Metabolomics in Dietary Supplement and Nutrition Research". Funded by the NCCAM/NIH/ODS/NCI, for the period of 9/1/2004 to 6/30/07, total award $35,000.00 (Mahady – PI). The objective of this work is to highlight advances in new and innovative research technologies and methodologies such as DNA microarray, chip technology and proteomics in

nutrition and dietary supplements research. A scientific symposium will be convened May 6-8st, 2007, in Washington, DC. This scientific conference will provide state-of-the-art information about current advances and applications of geneomics, proteomics, metabolomics and data mining to dietary supplements and natural products research based on our growing understanding of these techniques. The program and speakers include:

"Protein Fingerprinting of Complex Mixtures", John Astle, Department of Internal Medicine, University of Texas Southwestern Medical Center,Dallas, TX

"Parallel Characterization of RNA and the Proteome by Top Down Mass Spectrometry", Neil Kelleher, Department of Chemistry, University of Illinois at Urbana-Champaign, IL

"Metabolic Profiling of Natural Products and Drugs", George Harrigan, Monsanto Company, Creve Coeur, MO.

"Metabolomics in Nutrition", Dr. J. Bruce German, Nestle Research Center, Lausanne, Switzerland.

4. **Research and Product Development:**

A. “Clean Mouth Sensations from Different Cultures”. This project is funded by the Wm Wrigley Jr. Corporation, Chicago, IL for the period of 04/01/06 until 10/30/07. The project involves research and discovery of novel oral health products ($150,000 USD).

5. **World Health Organization:**

A. The development of the WHO Monographs on Selected Medicinal Plants, WHO Monographs on Selected Medicinal Plants, Volumes 1-4, WHO-TRM, 9/1/2004-12/30/2008, $65,000 (Mahady-Co-PI). This is joint project between the World Health Organization’s Traditional Medicines Programme and the College of Pharmacy (PAHO/WHO Collaborating Center for WHO) at The University of Illinois. The monographs, currently Volumes I-IV are extensive reviews of widely used medicinal plants from around the world. This project is currently funded by the WHO-TRM through 2006. The official WHO Consultation for Volume 4 of the WHO Monographs was held in Salerno, Italy in October 2005.

6. **Completed grants:**

A. Center for Botanical Dietary Supplements Research on Women’s Health. The Center is one of the five Botanical Centers funded by the NCCAM/NIH/ODS P50 AT 00155-404 (Farnsworth PI; Mahady Co-PI), Center of Botanical Dietary Supplements Research ($7.5 M) 9/20/1999-4/31/2005, Core B total funding $807,902 (Mahady). This work specifically focused its efforts on the investigation of the clinical safety and efficacy of 10 herbal supplements widely used in the U.S. for the symptomatic treatment of menopause, premenstrual syndrome and chronic urinary tract infections. As part of this project, two online Continuing Education Programs for Pharmacists were developed.

B. APFE Fellowship for graduate student Joanna Michel (Mahady-PI), American Foundation for Pharmaceutical Education, 1/2/2003-12/30/2005, $6000 per year. Ms. Michel successfully defended her thesis on March 8, 2006.

C. Completed WHO grants: WHO Monographs on Selected Medicinal Plants, Volume 1-3, funded from October 1995-August 2004, ($65-$80K per each volume).

EXHIBIT B

TO DECLARATION OF

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See Attached: Courtesy Copy Of Press Release To Be Issued On 11-28-07

NAD Procedures prohibit the use of NAD case decisions for any promotional purpose. If there are any trade publications that you would like to receive this press release, please forward via email a list of trade media contacts to Linda Bean, Director of Communications, lbean@narc.bbb.org. The list must be limited to trade publications and include the name of the publication, reporter/editor, complete address, telephone & fax numbers and email address.

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NAD Finds Support for Certain Claims, Recommends Caffeine Disclosure

New York, NY – November 28, 2007 – The National Advertising Division of the Council of Better Business Bureaus has determined that evidence provided by **Living Essentials** for its **5-Hour Energy Supplement** did support certain claims for the product. However, NAD has recommended the company clearly disclose the presence of caffeine in 5-Hour Energy Supplement.

NAD, the advertising industry's self-regulatory forum, has expanded its review of dietary supplements, pursuant to a series of grants from the Council for Responsible Nutrition (CRN). NAD inquired about certain print advertisements disseminated by Living Essentials for its 5-Hour Energy supplement. Claim at issue included:

- *"When you were a kid, you felt like you had energy to spare. Now you can get that feeling back with 5-Hour Energy."*
- *"Just one quick drink and you'll get hours of energy for work, play and everything in between."*
- *"It's a great way to stay focused and alert on the job, experience better workouts and reduce fatigue."*
- *"Hours of energy now. No crash later—and no jitters."*
- *"B-Vitamins for energy."*
- *"Amino acids for focus and better mood."*
- *"Enzymes to help you feel it fast."*.
- *"Zero sugar, zero net carbs, zero herbal stimulants."*
- *"Drink it in seconds. Feel it in minutes. Last for hours."*

Living Essentials maintained that all of its claims are supported by publicly available scientific evidence concerning the effect of each of the product ingredients on body physiology and function, and a double-blind, placebo controlled, randomized clinical trial on Living Essentials' 5-Hour Energy product.

Living Essentials explained that 5-Hour Energy contains all of the following ingredients: taurine; caffeine; D-glucuronolactone; malate; n-acetyl-l-tyrosine; l-phenylalanine; niacin; vitamin B6; vitamin B-12; folic acid; vitamin C; and a proprietary enzyme formulation.

The advertiser submitted a scientific report of Dr. Michael John Glade, explaining the mechanism of action for the energy-enhancing effects of the taurine, caffeine, and D-glucuronolactone combination contained in 5-Hour Energy and added that this science is well-known, and generally accepted in the scientific community.

Living Essentials maintained that the quantitative amounts and forms of ingredients contained in 5-Hour Energy Drink for each ingredient mirror that in the scientific literature documenting the claimed physiological effects.

Following its review of the evidence, NAD determined that, overall, the advertiser's clinical testing, together with its supplemental evidence, provided a reasonable basis for its energy performance claims for 5-Hour Energy. Similarly, the study provided support for the advertiser's claim that consumers will experience less of a "crash" effect than they might with certain competing energy drinks that contain sugar.

NAD, however, found that some of advertising it reviewed implies that 5-Hour Energy does not contain caffeine. NAD recommended that the advertiser modify these advertisements to clearly disclose the presence of caffeine in 5-Hour Energy.

NAD found that as long as the presence of caffeine contained in 5-Hour Energy is disclosed, the advertiser's claim that "there is no jitter effect" is not likely to confuse consumers.

Living Essentials, in its advertiser's statement, said it supports NAD's advertising review process and has reviewed in detail NAD's decision.

"NAD seeks, however, to ensure that Living Essentials' advertising consistently discloses the presence of caffeine in 5-Hour Energy and that Living Essentials' claim of no crash effect is qualified. Living Essentials intends to modify its advertising to accommodate," the company said.

NAD's inquiry was conducted under *NAD/CARU/NARB Procedures for the Voluntary Self-Regulation of National Advertising*. Details of the initial inquiry, NAD's decision, and the advertiser's response will be included in the next *NAD Case Report*.

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The National Advertising Review Council (NARC) was formed in 1971 by the Association of National Advertisers, Inc. (ANA), the American Association of Advertising Agencies, Inc. (AAAA), the American Advertising Federation, Inc. (AAF), and the Council of Better Business Bureaus, Inc. (CBBB). Its purpose is to foster truth and accuracy in national advertising through voluntary self-regulation. NARC is the body that establishes the policies and procedures for the CBBB's National Advertising Division (NAD) and Children's Advertising Review Unit (CARU), as well as for the National Advertising Review Board (NARB) and Electronic Retailing Self-Regulation Program (ERSP.)

NAD and CARU are the investigative arms of the advertising industry's voluntary self-regulation program. Their casework results from competitive challenges from other advertisers, and also from self-monitoring traditional and new media. The National Advertising Review Board (NARB), the appeals body, is a peer group from which ad-hoc panels are selected to adjudicate those cases that are not resolved at the NAD/CARU level. This unique, self-regulatory system is funded entirely by the business community; CARU is financed by the children's advertising industry, while NAD/NARC/NARB's sole source of funding is derived from membership fees paid to the CBBB. ERSP's funding is derived from membership fees to the Electronic Retailing Association. For more information about advertising self regulation, please visit www.narcpartners.org.

EXHIBIT C

TO DECLARATION OF

SCOTT HENDERSON

FILED UNDER SEAL